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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 374

BOB-LO EXCURSION COMPANY, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

FILED SEPTEMBER 26, 1947.

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[fols. 1-5] **IN SUPREME COURT OF MICHIGAN**

No. 43,302

Appeal from the Recorder's Court for the City of Detroit

Honorable John J. Maher, Recorder and Judge of the Recorder's Court

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff and Appellee,

v.

BOB-LO EXCURSION COMPANY, a Michigan Corporation, Defendant and Appellant

Record on Appeal

[fol. 6] IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

WARRANT

STATE OF MICHIGAN,
County of Wayne,
City of Detroit, ss:

To the Superintendent or any Captain, Lieutenant, Sergeant, Detective or Patrolman of the Metropolitan Police Force of the City of Detroit, in said County, Greeting:

Whereas, Sarah Ray hath this day made complaint to the undersigned Hon. John J. Maher a Judge of the Recorder's Court, of the City of Detroit, in said County, that heretofore, to-wit, on the 21st day of June, A. D. 1945, at the City of Detroit, in the County aforesaid,

Bob-Lo Excursion Company, a Michigan Corporation, being then and there an owner of a certain public conveyance on water, where refreshments are served, to-wit; the Bob-Lo Excursion Boat, there situated and docked at the Woodward Avenue Pier, did unlawfully then and there directly or indirectly, refuse, withhold, and deny to one Sarah Ray, a negress, certain accom-odations, facilities and privileges, thereof, in that the said Bob-Lo Excursion Company, a

Michigan Corporation, did then and there refuse passage and other accom-odations on account of the color of the said Sarah Ray, contrary to the form of the statute, etc.

Act No. 117 P. A. 1937, amending Sec. 146 Act No. 328 P. A. 1931. Contrary to the Form of the Statute, etc.

[fol. 7] And whereas, on examination, on oath, of said Complainant, by me, the said Judge of the Recorder's Court, it appears to me that said offense has been committed, and there is just cause to suspect the said accused party to have been guilty thereof; therefore,

In the Name of the People of the State of Michigan, You and each of you are hereby commanded forthwith to take the said accused party and him bring before the Recorder's Court, of the City of Detroit, at the Municipal Court Building, in the said City of Detroit, to be dealt with according to law.

Witness, The Hon. Paul E. Krause, Presiding Judge of the Recorder's Court of the City of Detroit.

Given under my hand and seal, at the City of Detroit, in said County, on the 11th day of July, A. D. 1945.

John J. Maher, Judge of the Recorder's Court of the City of Detroit.

[fol. 8] IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

Bill of Exceptions—Filed April 15, 1946

This cause came on to be heard on the 12th day of September, A. D. 1945, before the Honorable John J. Maher, Recorder and Judge of the Recorder's Court for the City of Detroit, at Detroit, Wayne County, Michigan.

APPEARANCES:

Gerald K. O'Brien, Prosecuting Attorney for Wayne County, and Joseph L. Bannigan, Assistant Prosecuting Attorney, for the People; Wilson W. Mills, for the defendant.

The defendant having formally waived a trial by jury, the case was tried before the Court without a jury.

RAY, SARAH ELIZABETH, called as a witness on behalf of the People, being first duly sworn testified as follows:

Direct examination.

By Mr. Bannigan:

My name is Sarah Elizabeth Ray and I live at 234 Eliot Street, Detroit, and I have been employed by the Detroit Ordnance District since last May. I have lived in Detroit for ten years. Previous to June 21, 1945, about forty girls, all classmates from Commerce High School, planned to take a trip to Bob-Lo Island. This trip was sponsored by the Detroit Ordnance District who conducted a class at said school. On the morning of June 21, only thirteen girls showed up at the foot of Woodward Avenue in Detroit to go on said trip. I was the only colored girl among them. [fol. 9] The other girls were white. When we arrived at the dock, we each paid eighty-five cents to Phyllis Walton, one of the girls in the group, to secure the boat tickets. She purchased the tickets and passed them around to the other twelve girls. I did not bother to read what was on my ticket.

The twelve white girls and I got on the boat together. On the way to the boat we passed through a gate. The ticket taker accepted my ticket. No one said anything to me while getting on the boat. We checked our coats,

went up on the top deck and sat down. We boarded the vessel Columbia for the trip to Bob-Lo Island, which is owned and operated by the Bob-Lo Excursion Company. Shortly afterwards two men, one dressed in uniform and one in plain clothes, came toward where we were sitting. We were not creating a disturbance at the time. They asked one of the white girls in our group, Rita Esper, sitting next to me if she knew me. The men were Mr. Robert E. Devereaux, assistant general manager of the Bob-Lo Excursion Company, and Mr. George Fox, a steward employed by said company.

Miss Reed, our teacher, asked these men what they wanted and they asked her if she knew me. They said I could not go along with the girls because I was colored. When I told my teacher they were discriminating against me, both Mr. Devereaux and Mr. Fox got angry and told me I would have to get off the boat. They stood over me and argued. My teacher got excited and I walked away because I was embarrassed. Mr. Devereaux and Mr. Fox yelled at me and said I was going in the wrong direction to leave the boat. I told them I was not leaving the boat and they ran and jumped in front of me. One of them called to three white men in white uniforms, waiters in the restaurant, [fol. 10] and told them "to throw this woman off," and they all closed in on me and got excited. I then told them I would leave the boat. Mr. Devereaux and Mr. Fox escorted me off the boat. Both of them told me I couldn't go on the boat because I was colored. While I was being led off the boat they told me I didn't have any right on the boat because it was a private concern and they could keep me off if they wanted to. They took me to the ticket office and offered to return my eighty-five cents back but I would not accept it. After I took the names of Mr. Devereaux and Mr. Fox, I left the premises of the Bob-Lo Excursion Company.

Cross examination.

By Mr. Mills:

I intended to disembark from the vessel at Bob-Lo and to have a picnic on the island.

Defendant hereupon introduced in evidence the tickets Exhibit A which was in the customary form of a two coupon ticket, one coupon for passage from Detroit to Bob-Lo and

the other coupon for passage from Bob-Lo to Detroit, and upon the reverse of each coupon appeared the wording "Right reserved to reject this ticket by refunding the purchase price."

Redirect examination.

By Mr. Bannigan:

I intended to have the boat take me to Bob-Lo Island. I am a negress, was born in Tennessee and have lived in Detroit for ten years.

Mr. Bannigan: That is the People's case.

[fol. 11] DEVEREAUX, ROBERT E., called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Mills:

My name is Robert Devereaux and I live at 106 E. Alexandrine, Detroit, and I am Assistant General Manager of the Bob-Lo Excursion Company, which was organized on December 13, 1939 as a Michigan Corporation for profit. Article II of the Articles of Incorporation (Exhibit B) is as follows:

"To lease, own and operate amusement parks in Canada, and to charter, lease, own and operate excursion steamers and ferry boats in interstate and foreign commerce, together with dock and terminal facilities pertaining thereto, and

"To buy, sell and dispose of all kinds of goods, wares, foods, beverages, merchandise, manufactures, commodities, supplies and products in connection therewith, and generally to engage in any for of enterprise necessary or convenient in connection with the aforesaid business of the company, and

"To lease, buy, sell, use, mortgage, improve and otherwise acquire, own, handle deal in and dispose of any and all property both real and personal, as may be necessary or convenient in connection with the aforesaid business of the company."

The only business in which the defendant has engaged in 1945 has been the operation of its steamships to Bob-Lo and the operation of Bob-Lo Island, excepting the defend- [fol. 12] ant has leased certain of its other docks to certain transportation companies for dockage privileges charging such transportation companies flat fee for each dockage. The defendant also leases a portion of its property at the foot of Woodward Avenue. Bob-Lo is the same island as Bois Blanc shown on maps and is an island in Canadian waters across from the town of Amherstburg, near the mouth of the Detroit River, and is a portion of the Province of Ontario, Dominion of Canada. The defendant has given up in 1928 the Belle Isle excursion business they had formerly and in which its predecessor was engaged. The Bob-Lo business to Bob-Lo Island is a seasonal business running in the summer months. The reason that Sarah Ray was refused passage was on account of her color. The defendant owns two vessels which it operates on the Bob-Lo run, —the Columbia and its sister ship the Ste. Claire. These vessels load at the defendant's docks in Detroit usually on the west side of Woodward Avenue at the Detroit River and both the dockage and adjoining landing property is owned by the defendant in fee. The defendant does not use Woodward Avenue, the passengers walk down the street. The ticket booths and so on all are on the defendant's property on the west side of Woodward Avenue. The defendant is successor by re-organization of the Detroit, Belle Isle and Windsor Ferry Company, the same company by re-organization. The defendant owns Bob-Lo Island in fee except a tract reserved for lighthouse purposes and three small cottage lots all of which are fenced off from the rest of the island by a five or six foot fence, and upon this property the defendant has erected a dining room, a cafeteria, dance hall, amusement buildings of various kinds, shelters and has laid out walks, drives, bicycle paths, bridle paths, roller skating rink, baseball and [fol. 13] other athletic grounds, bathing beaches and the like, and upon these it has expended upwards of $500,000.00. Five trips a day are usually made by the defendant during the season from its Detroit docks to Bob-Lo. These vessels each carry up to above 3,000 passengers. The vessel from which the complaining witness was asked to leave was the Columbia. The defendant caters largely to women and children and the defendant provides special policemen to

patrol the island to prevent all conduct and disturbance which would annoy patrons. The two vessels, the Columbia and the Ste. Claire, carry excursions of various churches, societies and organizations to the island selling tickets at reduced rate to such churches, societies and organizations which make a profit by reselling them at the regular rate, and the defendant's contracts with these churches, societies and organizations provide for different reduced rates to some than to others; in other words, the reduced rate is not uniform. During the seasons of 1944 and 1945 there were about 246 of such contracted excursions for each of said years from Detroit to the Island, and in some years the defendant will refuse a contract to a church, society or organization with which it had contracted the preceding year. In general the discount to such churches, societies or organization is based upon the number of members it will produce for the trip in question although sometimes the defendant grants higher discounts for fewer passengers than at other times which is dependent upon what the defendant considers to be sound business under the particular circumstances of each case. The defendant's charge for adults whom it carried to Bob-Lo in 1945 was .85¢ per round trip, except upon Sunday when its charge was $1.00 and also except Saturday nights when its charge was $1.25, including Federal Transportation tax. These charges were substantially the same as in the years [fol. 14] 1943 and 1944, although in 1943 there was a lower rate charged for Monday trips. All tickets issued to Bob-Lo during the year 1945 are in the same form as defendant's Exhibit A, sold at the Company's ticket offices, and tickets that are sold by organizations are a different size, but have the same stamp and all are priced the same, and they have the same wording as appears on the reverse of this ticket, i.e., "Right reserved to reject this ticket by refunding the purchase price." The defendant each year gives away several thousand passes to such persons it wishes. These vessels only carry passengers and they do not carry mail, freight or express. The defendant has no joint or through traffic rate with any railroad, steamship company, motor vehicle company, corporation or partnership. The defendant does not file any rate schedules or tariff with any authority whatsoever and it makes such rates as it sees fit. The total number of passengers carried upon both of these vessels in the year 1944 and the year 1945 were approxi-

mately 500,000. In 1944 the Columbia made 232 round trips and substantially the same number being made by the Ste. Claire, and in 1945 about the same number of trips were made by each vessel. The defendant adopted the policy of excluding so-called "Zoot-suiters," the rowdyish, the rough and the boisterous and it also adopted the policy of excluding colored. The defendant's vessels when they dock at the defendant's dock at Detroit, are always headed up-stream and as Bob-Lo is situated down-stream the vessels have to make, immediately upon leaving the dock, a large swing to the right and almost at once cross the international boundary and upon the run to Bob-Lo and return the international boundary is crossed four or five times each way and roughly half the run is in Canadian waters and the other half in American waters. These [fol. 15] two vessels are required by federal law to be enrolled by the United States Customs Service through the Collector of Customs at Detroit and the enrollment and license must be renewed annually. At the arrival of the vesels at Bob-Lo all passengers who land pass through the Canadian Customs and Canadian Immigration inspection. Upon the vessels returning from Bob-Lo to Detroit, there were formerly United States Customs and Immigration Inspectors at the Detroit dock, but with the advent of the war and the shortage of help, such inspection was dispensed with, and in its place the defendant was required to file a bond with the Treasury Department the condition of which was to indemnify the Government from any loss of revenue and expenses arising from any free importation of dutiable goods from Bob-Lo, and the defendant also has been required by the United States Immigration Service to furnish an agreement that it would not bring unauthorized aliens to Detroit from Bob-Lo or the mainland of Canada, and that the only persons which the defendant would carry from Bob-Lo to Detroit would be those persons whom in the first instance it had carried from Detroit to Bob-Lo. Periodically throughout the season a United States Immigration Inspector, under the jurisdiction of the Department of Justice, goes to the Island to inspect the manner in which it is policed so as to prevent persons entering the United States by way of the Island. There is no other means of access allowed to Bob-Lo Island except by the defendant's vessels. Annually the boilers, life preservers and all other equipment such as the hull, electrical system,

life boats and rafts and pumps on the defendant's vessels are examined by federal steamboat inspectors and if found satisfactory the steamboat inspectors pass the same and issue a permit to operate, which permit contains a limita-
[fol. 16] tion as to the number of passengers which each vessel may carry. The steamboat inspection service is under the jurisdiction of the Navy Department during 1945. The defendant likewise annually has to secure from the Dominion Government a somewhat similar license to operate the vessels, but during this war time, it is not strictly enforced. All water and milk served on the vessels is inspected by the Public Health Service of the United States Treasury Department. The defendant is required to make periodic customs reports to the United States Treasury, immigration reports to the Department of Justice, other reports to the United States Navy Department, to the United States Army Engineers and to the Department of National Health and Welfare of the Dominion Government, and these reports to Federal and Canadian authorities show amongst other things the number of passengers carried from Detroit to Bob-Lo and return and the number of round trips between Detroit and Bob-Lo for each vessel, and they disclose likewise the number of fire and life boat drills held on the vessels and give a written statement from the Master showing that all the vessel equipment is in satisfactory condition. This is required by the United States Inspection Service. The defendant is required to report to the United States Army Engineers in order to assist them in obtaining traffic information. At the beginning of each season it is required that defendant procure a United States customs clearance for each vessel to go to a foreign port. The Canadian customs requires that each vessel be entered once a day and a United States Clearance is presented to the Canadian authorities for this day and that ordinarily the defendant would have to make a United States Customs entry upon the return of each vessel, but [fol. 17] Federal regulations provide that if a vessel makes three or more of the same trips to a foreign port in a period of one week's time the vessel is not obliged to secure a clearance or be entered on each trip, so long as it makes at least three round trips a week to the same foreign port defendant may make monthly reports, in lieu of separate ones.

Mr. Mills: That is all.

Cross-examination.

By Mr. Bannigan:

On the 21st day of June last I was Assistant Manager of the Bob-Lo Company and had been for the past two and one half years. As Assistant Manager I was in control of operation of the concern on that date and I was then on the premises of the Company, i.e., both the premises on Woodward Avenue and also on the boat. I remember the complaining witness Sarah Ray. Mr. George Fox, the Steward of the Steamer Columbia was with me at the time. I told her she would have to get off the boat.

Q. Ordinarily are persons who are on the boat, are they passengers, that is, by paying the ticket and delivering up their ticket?

A. Ordinarily, yes. The ticket taker is located prior to getting on the vessel and it is taken for granted those on board have deposited a ticket. This lady was on the boat on the third deck, forward. Mr. Fox and I went to her and told her she would have to get off the boat.

Q. Did you tell her why?

A. I did not tell her why, I discussed it with the white people that she was with and I told them why she would have to get off the boat, that it was against our general policy to carry colored on our vessels. It was the general [fol. 18] policy on that date for the Bob-Lo Company not to carry colored passengers.

Mr. Mills: We will admit that defendant did not carry Miss Ray because she was colored.

Mr. Devereaux: The policy to exclude negroes has been in vogue for 21 years and may have been prior to that, and I know of no occasion where a negro got passage to Bob-Lo.

Q. Now you told Mr. Mills on direct examination that the boat company didn't use Woodward Avenue. How do people get to the premises of the Bob-Lo Boat Company?

A. Well, they step from Woodward Avenue on to our property.

Q. Then to get to the property of the boat company they have to use Woodward Avenue?

A. They use Woodward Avenue but we do not use it. The boat was docked on the Detroit River at our pier in the City of Detroit. The Bob-Lo Company advertises for

passengers in the three Detroit newspapers principally, and also uses street car advertising sometimes, but not the radio this year. The boat company is in the business of hauling people to Bob-Lo and back and providing recreation on the Island for them. The Bob-Lo Excursion Company, a Michigan corporation is the owner of Bob-Lo Island, they own it outright with the exception of four lots that are owned by others. It is the policy of the boat company to exclude negroes on those boats, to insure the continued success of the enterprise.

Q. Well now, do you sell beer on the boat?

A. On the evening trips.

Q. And who grants that license to sell beer?

A. We have a Federal Tax Stamp.

[fol. 19] Q. Are you licensed by the State of Michigan?

A. We have made application and received a license from the State of Michigan to sell beer.

Q. Have you received the same?

A. Yes.

Q. And the license is restricted to beer only, is that right?

A. Beer and wine, under 16%. Nothing was wrong with Sarah Ray except her being colored. There is nothing in our federal license or grant that makes it mandatory that we exclude negroes. Bob-Lo Island is part of the Dominion of Canada. There is no means of transportation from Amherstburg to the Island except what we provide, that is to our property and only to provide transportation to our own employees. There is no means of transportation from the other side,—that is the State of Michigan to the Island. When Miss Ray was ordered off the boat, she resented going off the boat and it was necessary to summon others than Mr. Fox to see that she did. We do not employ colored help on the boat with the exception of one colored cabin maid on one vessel. We have 52 employees on each vessel. In selling of tickets to these organizations and churches there is a clause in the contract excluding colored.

Re-direct examination.

By Mr. Mills:

Reference has been made to the use of Woodward Avenue. The pier from which the defendant loads is on the west side of Woodward Avenue and the only use made of Wood-

ward Avenue is the ordinary use of the public in walking down there. Tickets are purchased and entry is made on [fol. 20] the defendant's property and the boat is tied up on the defendant's property which is on the west side of Woodward Avenue.

Mr. Mills: I think that is all.

Mr. Bannigan: That is all. That is the People's case. We rest.

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. Mills: The defendant rests, and at this time I would like to move the court for a verdict or judgment of not guilty upon five grounds. (The five grounds are the same grounds as are set forth in the written motion for judgment of not guilty filed herein p. 24). A lengthy argument of law followed and thereupon the Court adjourned the matter until October 30th upon the Court asking the name of the Boat Company in the Meisner case which was Detroit, Belle Isle & Windsor Ferry Company, and Mr. Mills stating that the present defendant was its successor by reorganization.

The Court: Do the Bob-Lo Excursion Company boats make any stops between Detroit and Bob-Lo?

Mr. Devereaux: There's no stops made between Detroit and Bob-Lo on any days that we operate between Detroit and Bob-Lo. You understand there are times of the year our vessels don't operate from Detroit at all, they operate from Windsor to Bob-Lo and on all days where they operate from Detroit to Bob-Lo we do not make any stops between Detroit and Bob-Lo, with the exception of a few days where we pick up passengers at Wyandotte, Michigan, to go direct to Bob-Lo, and on this particular day, no stop was made between Detroit and Bob-Lo. On some days the Bob-Lo Excursion Company makes trips from Canadian ports like Windsor, to Bob-Lo and back to Windsor. No passengers are carried to or through the United States on those days.

Mr. Mills: We are prohibited from carrying passengers from Detroit to Bob-Lo on the days we carry them from [fol. 21] Windsor to Bob-Lo and that is on account of the Customs and Immigration.

(Adjournment.)

(On October 30, 1945 the Court reconvened with the same appearances.)

Mr. Mills: There are two motions pending before your Honor, one made verbally for a verdict and one in writing for a judgment, and they are on the same grounds, they are brought on the same grounds and the same issues as this case.

Thereupon the cause was adjourned until November 16th when Court reconvened with same appearances. The Court furnished counsel with and filed his written opinion denying defendant's motions for verdict and judgment of not guilty.

The Court: The motion for directed verdict of not guilty is denied and the defendant, the Bob-Lo Excursion Company, is found guilty as charged.

Mr. Mills (Interrupting): For the purpose of the record, I take it that your opinion has denied both of the motions I made, one for a verdict of not guilty and the other for a judgment of not guilty?

The Court: That is right. Let the record show that the Court, in the way of a sentence,—that the sentence is that the defendant company pay the sum of $25.00, the same to be listed on the file and in our records as costs. And I am informed that counsel for the defendant has a motion for a new trial here with him so I assume that you want a 20 day stay. There is a stay of 20 days.

(The court then adjourned and on November 30th reconvened with the same appearances.)

The Court: The Court does not want to change its ruling. The whole matter is a sufficiently close question that two good lawyers like you and Mr. Bannigan, who have worked [fol. 22] on the thing for sometime agree that it is a close question. Is that right, Mr. Bannigan?

Mr. Bannigan: That is true, your Honor.

The Court: I wrote an Opinion in harmony with my views. I may be a hundred per cent wrong. But it is such a matter that will cost very little to have it appealed because there is little or no record. I think the case is one that should be appealed and it probably will be.

Mr. Mills: It will be appealed.

The Court: And so let us have the Supreme Court decide this matter. It is not one of these hundred percent one way or hundred percent the other way cases. It is a close case.

Mr. Bannigan: That is true. I think both counsel and the Court have realized that all the way through, the issue is close.

Mr. Mills: I take it your Honor is denying my motion for a new trial on the grounds mentioned in your previous opinion?

The Court: That is right.

Mr. Mills: Then your Honor will give me the benefit of a twenty day stay of proceedings, on the record?

The Court: Yes. That is done right now, on the record.

[fol. 23] CERTIFICATE TO BILL OF EXCEPTIONS

I, John J. Maher, Recorder and Judge of the Recorder's Court for the city of Detroit, State of Michigan, hereby certify that the foregoing bill of exceptions, together with the exhibits therein mentioned, constitute the testimony taken and the proceedings had in said cause and the whole of the same; and that where either questions or answers appear therein, they are deemed necessary to a proper understanding of said cause and of the testimony therein, and that the foregoing reasons and grounds for appeal and assignments of error were attached to said bill of exceptions at the time of its settlement; and that the time for settling said bill of exceptions has by proper order been extended to and beyond the date hereof, and that after due notice, I have settled, signed, and certified the same on this 15th day of April, A. D. 1946.

John J. Maher, Recorder and Judge of the Recorder's Court for the City of Detroit.

O.K. as to form and substance: Andrew DeMaggio, Assistant Prosecuting Attorney.

[fol. 24] IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

MOTION FOR ENTRY OF JUDGMENT OF NOT GUILTY—Filed September 20, 1945

Upon the parties hereto each resting, defendant made an oral motion for a verdict of not guilty upon grounds therefor then orally stated. The defendant now moves for a judgment of not guilty upon the same grounds, to-wit:

. . . . . .

(2) That the said Michigan Civil Rights Statute is void as to defendant as being a purported state regulation of foreign commerce in violation of the commerce clause of the federal Constitution, to-wit: Article I Sec. 8, (3), thereof.

(3) That the said Michigan Civil Rights Statute is inapplicable as to defendant as being a purported state regulation of foreign commerce in violation of the commerce clause of the federal Constitution, to-wit: Article I Sec. 8, (3), thereof.

. . . . . .

[fols. 25-26] Respectfully submitted, Wilson W. Mills, Attorney for Defendant, 1712 Ford Building, Detroit 26, Michigan.

[fol. 27] IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

DECISION ON MOTION AND VERDICT—Filed November 16, 1945

Only one witness for each side testified at the trial, the complainant for the People and Mr. Devereaux for the defense. The complainant, Miss Sarah Ray, testified she was a negress and that on June 21, 1945 she was refused passage and other facilities and accommodations on the Bob-Lo Boat by the defendant company, although her fellow employees and companions—all of whom were of the Caucasian race were granted passage, privileges and accommodations on said boat by said Bob-Lo Excursion Company. Mr. Devereaux, an employee of said defendant company, agreed with complainant's testimony and also answered some questions from his own personal knowledge and some from exhibits—which were introduced—relative to the type of business or commerce of the defendant company, plus data on inspections, immigration, rates, etc.

On cross examination of Mr. Devereaux, it was shown that the Bob-Lo Excursion Company ran "ads" in the public press for business or rather passenger trade and that the tickets sold were what might be called "Round Trip Tickets." In short, the testimony was very brief, as counsel for each side more or less agreed to the facts in the case.

At the end of the People's case and again at the conclu-

sion of trial, the defendant, through its counsel, moved for a directed verdict of not guilty. Oral arguments were made and briefs filed and the matter stood adjourned until today for the Court's decision and verdict.

[fol. 28] In treating and considering this matter in its entirety, the Court has divided the same into six (6) divitions:

1. Statement of Facts
2. Statement of General Rules
3. Analysis of Cases in Defendant's 1st Brief
4. Analysis of Cases in Defendant's 2nd Brief
5. Questions involved—Answers—Authorities
6. Decision on Motion and Verdict

General Rules

Congress has exclusive plenary power under the Constitution to regulate our state and foreign commerce. However, the states still have police power within their borders to pass legislation, even although it may incidentally regulate, for state purposes only, their citizens, including also those citizens who accommodate the public for hire within state jurisdiction.

The navigable waters adjoining the state are within state jurisdiction and defendant is a Michigan corporation, and therefore, a Michigan citizen.

Defendant operates a public conveyance on water, since it operates a steamer, advertises pleasure cruises and fixes the price to the public. It is not a common carrier. It does not have *that* special relationship with the state, nor the special privileges of the common carrier.

Since defendant is a Michigan citizen operating to and from Michigan, it may not discriminate on the grounds of race or color when carrying passengers for hire to and from Detroit. If it does discriminate on either grounds, it [fol. 29] violates the Civil Rights Act. This defendant is charged with a violation of that act in Detroit.

Defendant claims, of course, that because it operates a pleasure park on an island owned by it, located in Canadian waters, and because to reach that island it must go partly through Canadian waters, that it is engaged in foreign commerce. The evidence does not show that the island is inhab-

ited except, perhaps, by some of the defendant's employees engaged in the operation of the amusement park. That park is operated entirely for defendant's benefit for profit. The steamer on which complainant was refused passage operates from defendant's wharf in Detroit through the Detroit River into Lake Erie and stops at Bob-Lo Island in Canadian waters. It stops nowhere else and it returns to Detroit. No one-way tickets are sold. Freight is not carried except such as may be used by defendants in operating their amusement park. It makes no other stops in Canada. Its advertisements hold it out as offering pleasure cruises, as well as the amusement to be had on Bob-Lo and not all passengers alight at Bob-Lo.

According to the brief, defendant has both United States and Federal Maritime licenses. It is subject to the regulations of the United States as regards the food and drinks served by it on the island. Apparently, there is no Canadian inspection. It reports to the United States Customs and Immigration Departments, as well as to the Canadian. It is subject to the United States regulation as regards its equipment on the steamer. Apparently, the Canadian regulations have to do merely with preventing uninspected importation or immigration for which this defendant has no license.

[fol. 30] As a carrier of passengers, defendant is subject to direct regulation by Congress whether under the Interstate Commerce Commission, the Maritime Commission, The Federal Shipping Act, or similar Federal regulation.

The Interstate Commerce Act, while directed to the business of common carriers only, expressly insists upon prohibition of discriminations of any type. That prohibition is broad enough to forbid discrimination on the grounds of color, as the Mitchell case cited by defendant affirmatively shows. By its terms, the Interstate Commerce Act includes commerce with an adjacent foreign nation originating in the United States.

Of course, Congress has no regulatory power over foreign commerce, except by treaty, or except such as originates in the United States or ends there or both. If it does originate and end within the United States, Congress' power is clear, even although part of the trip may be through foreign territory or over foreign waters. A state has no jurisdiction beyond its borders. Michigan's jurisdiction includes the navigable waters adjoining Michigan

to the center line. Of course, Michigan does have jurisdiction over offenses committed in Detroit.

Conveyance by water which starts from Detroit, goes through American and Canadian waters to an island in Canadian waters, owned and operated by defendant, said conveyance carrying passengers who buy only round trip tickets in Detroit to go and return and carries no other passengers, even though it allows temporary disembarkation at the passenger's election on the island in Canadian waters, is not, I think, engaged in foreign commerce.

[fol. 31] Transportation is commerce, but transportation to and from Detroit with the temporary stop-over is not, the Court thinks, foreign commerce. If the amusement is commerce, it is not foreign commerce, even though on foreign soil, unless it includes some type of inter-course or exchange with a foreign nation. This intercourse or exchange on Bob-Lo is controlled by American citizens and involves no foreign inter-course.

Moreover, the Civil Rights Statute of Michigan is not an attempt by our state to regulate directly either Interstate or Foreign Commerce, even though it may incidentally affect some Michigan citizens who engage in such commerce. It follows that even if we assume that defendant's business is, as it claims, foreign commerce, it is still subject to state regulation under the state police power for acts committed in the state. If the statute does affect such citizens' commerce incidentally, it still does not contravene the plenary right of Congress to regulate.

The rule is well settled that if Congress does regulate in a given field of commerce, the state's police power may not regulate in the same field. The commerce clause was intended to give Congress exclusive power in fields where a single authority is indicated. However, where Congress does not or has not regulated, the state may regulate within its own jurisdiction even though the regulation directly affects commerce, unless there has been some Congressional indication that in that particular field of commerce Congress desired commerce to be wholly untrammeled.

That situation, of course, does not here exist. Every regulation of commerce controlling either Interstate or Foreign Commerce and emanating from the Congress has been declaratory against discrimination. Clearly, there-

[fol. 32] fore, it must be inferred that Congress does not

desire *any* type of commerce to indulge in race discrimination.

It is true that a state exercises of police power whether aimed directly at commerce or not, will not be held valid if it imposes an additional and unreasonable burden on either Interstate or Foreign Commerce. Assuming, though not admitting that defendant is engaged in commerce at all, other than transportation, still the statute imposes no burden upon defendant. The Civil Rights Statute forbids discrimination but it makes no mandatory provision. If the defendant should desire to outfit its steamer with separate equal accommodations for whites and colored and it is engaged in foreign commerce, such an outfitting would, under the decisions, be valid as far as Federal supervision is concerned. However, our statute does not burden defendant with the requirement that it must so segregate. It merely lays down the rule that defendant may not discriminate against citizens of Michigan or residents of Michigan, either on the score of race or color.

An analysis of all decisions cited by defendant reveals no support for defendant's contention that the Michigan Statute contravenes Congressional power over foreign commerce. The only case which appears to so hold is Pryce v. Swedish-American Lines, 30 Fed. Supp. 371. However, that case is:

1. Not a decision by an Appellate Court.

2. Is based squarely upon the decision of Hall v. DeCuir, 95 U. S. 485, where the La. Statute was held as constitutional

because:

[fol. 33] a. Expressly said by the La. Supreme Court to operate interstate.

b. Was expressly found by the U. S. Supreme Court to burden commerce.

Our Civil Rights Statute claims no extra territorial jurisdiction and asks to impose no burden.

Analysis of Defendant's Citations

Cases in First Brief

It should be noted that throughout the brief defendant uses, interchangeably, the terms "public conveyance" and "common carrier." They are not the same. This defendant is a public conveyance and a carrier but not a common carrier.

1. Public Utilities v. Duke, 266 U. S. 577.

This was a case where the United States Supreme Court held a Michigan statute to be unconstitutional because: First, it was a direct regulation of interstate commerce. Second, it imposed a direct burden by forcing upon all carriers, who used Michigan highways, the liabilities of common carriers.

Defendant Duke was a citizen of Ohio, who operated freight trucks and had three contracts to carry furniture from Ohio to Michigan. The act declared unconstitutional would have compelled him to live up to the duties of a common carrier, although he did not have the special privileges of such a carrier, such as eminent domain. The Supreme Court said that a private carrier could not be made a common carrier by legislative fiat.

2. Meisner v. Ferry Company, 154 Michigan 545.

[fol. 34] In that case, the defendant was the predecessor of the defendant in the instant case. It was sued for discrimination in refusing to carry plaintiff. This was not a discrimination for race or color and, therefore, the earlier version of the Civil Rights statute, then in effect, could not have been invoked. The theory of the suit was that as defendant was a carrier, it could not pick and choose passengers in the absence of misconduct. This was the law of common carriers at common law. However, the Supreme Court held that defendant was not a common carrier, it did not have the special privileges of a common carrier and could select the passengers it chose to carry. The decision pointed out that defendant was as much a private business as theatre or a race course. This is significant because the Civil Rights Statute penalizes discrimination on the part of theatres and race courses, as well as conveyances, if the discrimination is based on race or color.

In the Meisner case, there was no discussion of whether or not the defendant was a public conveyance. The only distinction drawn was between common carrier and private carrier. Many private carriers are public conveyances if they hold themselves out to the public for hire.

That decision throws no light whatsoever on the question in the instant case.

Defendant cites cases to prove that criminal statutes must be strictly construed and also that state courts are bound by the decision of the United States Court on Federal constitutional questions. Those cases will not be discussed, since those *principles* are conceded.

[fol. 35] 3. Hall v. DeCuir, 95 U. S. 485.

This was an appeal from a decision of the La. Supreme Court, affirming a judgment for damages in favor of Mrs. DeCuir, a colored woman who had taken passage on defendant's steamer plying the Mississippi River between points in Louisiana and in adjoining states also. She was refused entry to the cabin reserved for white persons, although she was offered accommodations in the negro section, which she refused. The Louisiana statute prohibited carriers from discriminating on the score of race or color. It was a direct regulation of commerce, therefore, and the La. Supreme Court in its decision stated that the statute was broad enough to apply to interstate commerce. Mrs. DeCuir had recovered damages and the owners of the steamer appealed.

The United States Supreme Court said that they must accept the holding of the Louisiana Supreme Court; that the statute was intended to have interstate effect. This, they said, was to contravene the power of Congress to regulate commerce interstate. They also pointed out that this regulation, besides being interstate, would impose a burden upon commerce because two of the adjoining states had statutes which required carriers to segregate whites and colored. They said that the steamer might have to have accommodations for whites and colored elsewhere if it passed through the waters of the Mississippi, for example, and when the steamer reached Louisiana, it would be compelled to change the system and mingle the two; and then, perhaps, at the next stop, segregate them again in another state, which would be burdensome.

On the score, then, that it was a direct and deliberate regulation of interstate commerce and that it imposed a burden upon commerce, they held the statute unconstitutional.

[fol. 36] The distinction between that case and the instant case is clear. Our Civil Rights Statute is not a direct regulation of commerce. It is only incidental. Moreover, our Court does not claim that the statute has extra-territorial effect or applies to interstate commerce directly.

The DeCuir decision reflects the earlier Federal decisions which attempted to meet the southern problem arising under the 14th Amendment. Technically, the decision is correct, but inapplicable here.

4. Mitchell v. United States, 313 U. S. 80.

Mitchell, a colored Congressman, took passage for an interstate journey starting in Illinois and including, among other states, Arkansas. He paid a first class passage but at the Arkansas border, he was compelled to transfer to a second class cabin, because Arkansas had a law requiring carriers in the state to segregate white and colored. He was offered a refund on his ticket, which he refused. He made complaint to the Interstate Commerce Commission that the railroad was discriminating. The Commission held a hearing at which was shown that very few colored persons demanded first class passage. It was also shown by the testimony that the first and second carriages differed. Actually, second class accommodations were greatly inferior in a number of respects. The Commission ruled that in view of the circumstances, the discrimination was not unreasonable. Mitchell appealed to the United States Supreme Court which reversed the Commission's finding, holding that the discrimination forbidden in the Interstate Commerce Commission Act included color discrimination. That such discrimination was unreasonable. That while Arkansas had a right to demand segregation, that did not relieve the railroad from the duty to avoid discrimination by offering equal accommodations to persons of both colors. [fol. 37] The statute was not, as defendant's brief alleges, held void. It was conceded that the state had the power to make such a statute, but that it could not affect interstate commerce so as to negative the Interstate Commerce Act which prohibited discrimination.

In the case at bar, if defendant is really engaged in foreign commerce, as it claims, and if the same rule applies under the Act, which it probably does, then consistently with the Mitchell decision, this Court should find that the Civil Rights Act is valid as affecting such commerce, but that it cannot affect it so as to require the carrier to refuse the passenger equal accommodations. In other words, Congress has forbidden common carriers to refuse equal accommodations in interstate commerce or in a commerce to the United States to a foreign or adjacent country, or from such a country to the United States. The Supreme Court has ruled that they may segregate in the states which so require so long as accommodations are equal. This, of course, does not license carriers to refuse *all* accommodations. Insofar as it is applicable at all, the Mitchell decision refutes defendant's contention, since under it Congress has gone on record as demanding equality of accommodations and as branding denial thereof as discriminatory, both in state and interstate commerce.

Since, however, the Interstate Commerce Act attempts regulation only of common carriers, the case is applicable only by analogy. However, it also shows affirmatively that Congress does not desire all commerce under its control to be so untrammeled that it may indulge in racial discrimination.

It is unfortunate that since defendant is not a common carrier, this complainant cannot have recourse to the same procedure adopted by Mitchell under the Interstate Com-[fol. 38] merce Act. She cannot, however, because that Act expressly applies only to common carriers.

In passing, the Court remarks that statutes, such as Arkansas and some other states, mostly southern, have passed, would be held unconstitutional in Michigan as Michigan decisions hereinafter discussed affirmatively show.

5. Edwards v. California, 314 U. S. 116.

This involves a California statute which attempted to discriminate against indigent persons seeking to enter the state and made it a penal offense to assist in such entry. Defendant Edwards brought his brother-in-law from Texas into California by car. The evidence showed that the brother-in-law was indigent within the meaning of the Cali-

fornia statute and Edwards was found guilty. He appealed and his conviction was reversed by the United States Supreme Court on the score that the California Act was an unconstitutional barrier to commerce and, therefore, not a valid exercise of the state police power. The Supreme Court in its discussion expressly recognized that a state statute exercising police power in a matter of local concern is valid, even though it may thereby affect interstate commerce (Syll. 2).

Justice Byrnes wrote the opinion. Justices Douglas, Black and Murphy, while concurring in the result, preferred to place the decision on the grounds that the statute violated the 14th Amendment and declined to find it a violation of the commerce clause. Justice Jackson, in a third concurring opinion, expressly repudiated the commerce clause reason.

The California regulation was expressly aimed at interstate transportation. It had no other purpose. It also expressly denied the rights of national citizenship. Under [fol. 39] either viewpoint, the decision was correct but offers no support to defendant's position in the instant case. In our case, the Statute only incidentally touches upon commerce outside the state and it does not deny to any citizen the equal protection of the laws.

6. Pryce v. Swedish-American Lines, 30 Federal Supplement 371.

This was decided in 1930 but never carried to any Appellate Court, so that it is in no sense authority.

Mrs. Pryce, a colored American citizen of New York, bought a ticket to South America on defendant's line and was later refused accommodation expressly because she was colored. She made a complaint in New York under that state's Civil Rights statute, which is quite similar to our own. It was transferred to a lower Federal Court, apparently, a Maritime Court, presumably because of diversity of citizenship. Without any discussion, the Court declared the statute could not apply to defendant, expressly resting its decision on the case of Hall v. DeCuir, supra.

Since the New York State Supreme Court had not claimed extra-territorial effect for its statute and since it was not shown that it had imposed an additional burden upon the defendant to accept Mrs. Pryce, the Hall-DeCuir

decision was not authority in such a decision for the Pryce decision. No other reason was given. In this Court's opinion, an appeal to the United States Supreme Court, or even to the Circuit Court of Appeals, would have resulted in reversal. In any case, the decision of such a court is in no sense binding. If it were, then a common carrier operating from a point in the United States to a foreign or adjacent country, the defendant would have been under the supervision of the Interstate Commerce Commission and [fol. 40] would have been held guilty of unreasonable discrimination, as was the defendant in the Mitchell case.

Defendant, in his brief on page four, contends that the effect of these citations is to prove that Congress only has power to regulate foreign and interstate commerce and that its failure to act is equivalent to a declaration by Congress that commerce in that field shall be unregulated. However, that is not the effect of these citations. It is true that Congress under the Constitution is given power to regulate interstate and foreign commerce. It is further true, as the decisions point out, that if Congress fails to regulate in any particular field, there are two possible results:

1. Its failure may be held to indicate a desire by Congress that in such a field, commerce is to be unhampered or it may indicate that Congress in that field desires to leave regulation to the states under their police power.

In a situation where Congress, in every recorded regulation of commerce so far as it has regulated, has forbidden the very thing that Michigan statute forbids, namely, racial and color discrimination, but where Congress has applied its ruling only to common carriers, it cannot logically be argued that Congress desires other types of commerce to be free to so discriminate. Inferentially, at least, Congress has left to the state police power to regulate against discrimination in commerce.

The difficulty, of course, with the decisions is that they do not necessarily each arise in the same way and no one considers all the points which may be raised in another, wherein circumstances are similar. In citing decisions, therefore, it is safest to first analyze them from both viewpoints.

[fol. 41] For example, Hall v. De Cuir would say that Louisiana had gone beyond its police power in attempting

to directly regulate commerce. They said so because the Louisiana Court had said so and had said that the Act had extra territorial effect. However, in our Michigan case, there is no such direct regulation of commerce and no claim that the Act regulates interstate commerce either.

2. The Duke case again decides only that a state statute may not so regular- interstate carriers using Michigan highways as to make them assume the burden of being common carriers when they are not.

The Mitchell case simply shows that Congress, by regulation, forbids discrimination and that that regulation requires carriers, subject to the Act, to furnish equal accommodations. As a result, if the carrier, as that one did, passes through a state where the state law requires segregation by color, the carrier must segregate but must still offer equal accommodations. That case does not decide whether or not the Arkansas statute is unconstitutional.

The Meisner case, on which the defendant relies so heavily, has no reference to commerce at all, while the Edwards case is a state attempt to directly prohibit one type of interstate commerce.

Defendant cites further cases where state statutes enacted under the police power were held to be unconstitutional as attempts to regulate interstate commerce. All those applicable were direct regulations of interstate commerce; none cited were statutes forbidding discrimination under penalty within a state, of carriers who might also operate beyond the state lines.

7. Defendant cites Gloucester Ferry Company v. Pennsylvania, 114 U. S. 96.

[fol. 42] This proves that transportation is commerce, which is admitted and that it requests uniformity of regulation, which, second statement, is only partly true. In that case, defendant operated a ferry, carrying freight and passengers from a point in New Jersey to Pennsylvania and vice versa. It was a New Jersey corporation and operated on the Delaware River between the two states, owned a dock in New Jersey and leased one in Philadelphia. It owned no property in Philadelphia except the lease and its ships stopped there only long enough to discharge and take on passengers and freight.

Pennsylvania attempted to tax the entire corporate stock of defendant, holding that it was doing business in Pennsyl-

vania, but the United States Court held that its business was in interstate commerce and so not taxable by the state where it held no property, except that the lease could be taxed.

"Commerce among the states" the Court said "consists of intercourse and traffic between *their citizens* and includes the transportation of persons and property and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities." • • • "Congress alone therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state regulation. Otherwise, *there would be no protection* against conflicting regulations of different states, each legislating in favor of its own citizens and products and against those of other states." Clearly, then, the basis of that decision and of the decisions which hold state statutes to be burdensome was the danger of conflicting regulations, if any but Congress could legislate, a danger arising when each state tried to favor its own. Clearly, the type of police regulation in the case at bar does not fall within that purview, since there is no danger [fol. 43] to be apprehended from conflicting jurisdictions. Canada can regulate defendant only to prevent violations of the customs or the immigration laws. It cannot require segregation nor compel defendant to refuse passengers because of color. The decision in the Gloucester Ferry case, then, does not go so far as to prevent a state from exercising its police power in its own territory, to prevent color discrimination, even although the defendant is engaged in foreign commerce and intends when it leaves Michigan to go in foreign waters.

It should be pointed out, too, that in the Gloucester Ferry case, passengers were landed on both sides of the river and embarked from both sides and freight came from both sides so that it was truely interstate. This defendant, however, carries only passengers from Detroit and the same passengers back to Detroit, and it does not land in any Canadian port as part of the trip. It is not, we think, commerce at all, or if it is, it is not foreign commerce.

8. Railway v. Covington, 235 U. S. 537.

This was held to be a direct regulation of interstate commerce, and was also held to be unreasonable and burdensome. The regulation was a statute of Kentucky regulating

the operation of straight course which ran over a bridge from Covington, Kentucky to Cincinnati, Ohio which bridge had been held in a prior decision to be an instrument of interstate commerce. Single fares were collected, some to start in Kentucky and others to start in Ohio. In deciding that it was interstate commerce, the Court point- out expressly that the test of interstate or state (character), is to be derived from what is actually done and from inquiring whether transportation is really and in fact between the [fol. 44] states. This case is important as emphasizing the difference between state and interstate transportation. They based the interstate decision on the fact of one-way fares. Defendant's fares are all two-way, originating and ending in Michigan.

9. South Carolina v. Branwell Brothers, 306 U. S. 177.

Cited by defendant, this decision perfectly supports the validity of the Michigan Civil Rights Act and definitely denies the correctness of the defendant's position.

A United States District Court, at the request of Branwell Brothers, which was an interstate trucking company, had enjoined the State of South Carolina from enforcing a state statute, which prohibited the use, on state highways, of motor trucks weighing more than twenty thousand pounds. This applied to all trucks, including interstate trucks. However, the United States Supreme Court reversed the District Court hold- that the statute was reasonable and not a violation of the commerce clause.

The District Court had said that it was burdensome on traffic which would normally go through South Carolina and, therefore, was an unreasonable regulation of commerce interstate. The Supreme Court answered that Congress had not undertaken to regulate said interstate traffic; that the object of the regulation was to improve intrastate commissions and was not *discriminatory* against other states; that it has always been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress.

[fol. 45] So, Michigan, as well as South Carolina, has a right to regulate its places of public accommodation, even though this results, incidentally, in the regulation of defendant, who claims to be engaged partially in foreign commerce.

Here is no attempt to discriminate between citizens and non-citizens, because defendant is a Michigan citizen. This is merely a state regulation on a local matter. On this point, because of their number and diversity, Congress has not tried to regulate all carriers—only common carriers—by regulating common carriers against color discrimination. However, Congress has indicated that it does not consider such regulation a burden and does not desire to leave the field of foreign commerce free. Clearly, then, our regulation is valid because:

a. It is reasonable.

b. It is not burdensome.

c. It affects outside commerce, if at all, only instantly.

d. It is in accord with the Congressional viewpoint against color discrimination.

10. The Minnesota Rate Case, 230 U. S. 352.

These cases held affirmatively that "Congressional non-action on the subject leaves each state free to establish maximum intrastate rates for interstate carriers, which are reasonable, even though these may require readjustment at state boundaries, certainly that decision offers defendant no support.

11. Kansas Gas Company v. Kansas, 265 U. S. 298.

Defendant corporation was engaged in piping gas, originating in Oklahoma and in Kansas, in pipes through the State of Kansas to Missouri and in selling to distributors [fol. 46] in both Kansas and Missouri. The Kansas Public Utility Commission attempted to fix the rates *to* which defendant could sell. However, the Supreme Court held that the business was purely interstate, but that Kansas could fix the rate for distributors to sell in Kansas, but could not govern an interstate carrier selling in Kansas to distributors. This, they held, would be a direct burden and purely interstate comerce. The Court can see no benefit to defendant by this decision.

Finally, defendant cites its own case in the Wayne Circuit Court, No. 219803 in Chancery. The Circuit Court is, of course, a Court only of concurrent jurisdiction with the Court and the decision, whatever it was, is in no sense binding.

Defendant's last assertion in his brief that a corporation as a citizen has the same rights as an individual is not disputed, but not here involved, so the Court passes the citations offered by the defendant on this point.

ANALYSIS OF DEFENDANT'S SECOND BRIEF

I. Defendant repeats it reliance upon the Meisner case, which is here inapplicable. Defendant also again insists that because it is not a common carrier it is not a public conveyance. However, it does offer public accom-odations for hire and that is the test, not the type of ownership or the type of a corporation.

Defendant also insists that because the statute reads "public conveyance on land and water" and because defendant only operates on water, the statute does not apply. Michigan decisions have repeatedly held that the words "and" and "or" may be either conjunctive or disjunctive and that the test is intent. One such decision is Elliott vs. Market, 286 Mich. 112, where the Court construing the [fol. 47] statute on bulk sales held that "or" should be read "and." There is, of course, the further rule that a statute must not be so interpreted as to become absurd. The wording of this statute goes back to 1866 to a Federal statute from which it was copied. It has been enforced in Michigan since 1875. At that time, amphibian planes had not been invented. Our attention has been called to no other type of conveyance, both on land and water.

II. Whether or not defendant is engaged in foreign commerce is, at least doubtful. However, if it is, it cannot escape every type of state regulation, incidental or even direct, so long as the regulation is reasonable, not burdensome, and does not encroach upon Congressional powers.

The real test of foreign comerce is whether or not there is, in fact, traffic or intercourse with foreign nations. Another test is the location of the termini. Both are in Michigan.

Defendant's business is transportation plus amusement. Whether the passengers stay on board or get off at Bob-Lo, they still make no contacts with citizens of Canada, have no trade with them—the traffic or trade, if amusement, is traffic—only with defendant. However, assuming that this is foreign commerce, the statute is still applicable. It is in a field not covered by Congress but it is the type of

statute which Congress has approved in other cases by disapproving discrimination.

The offense committed by defendant was committed in Michigan and completed there. It is not a continuing offense. The offense consisted of the violation of a reasonable statute. Defendant asks "What in God's World" does [fol. 48] the Michigan Civil Rights statute seek? The Court answers "It seeks to see that all of God's children have equal rights in Michigan."

III. Defendant refers to 109 U. S. 3, following:

The so-called Civil Rights cases, wherein the Supreme Court held the first two sections of the 1866 version of the Federal Civil Rights Statute to be unconstitutional. They so held, because they said that the constitution was the only source of Congressional legislative power. All else was reserved to the states. They said that the 14th Amendment did not give Congress power to legislate against discrimination, but merely to protect those against whom the states discriminated. They did say that Congress could legislate on that subject to regulate commerce. Congress has so legislated in the Interstate Commerce Act, but only as to common carriers. For the rest, the legislation job is still that of the states. Michigan performed that job when it passed its Civil Rights Act.

The Court agrees with defendant that dissenting opinions are not controlling, although they sometimes become majority opinions at a later time; as witness, for example, Child Labor Legislation and minimum wages. It is necessary to read each decision in the light of the conditions at the time and it is necessary to be sure on what grounds a decision rests. In citing both the Hall and the Edwards cases, defendant forgot to do just that. However, defendant cannot deny that our Michigan Supreme Court in Bolden vs. Operating Company, 239 Mich. 318, has held that the Civil Rights Statute is not lack of due process under the Federal 14th Amendment. That case cites Ferguson vs. Gies, 82 Mich. 358, my reading of which would form an excellent background to the case at bar. The court adds, [fol. 49] also, that the United States Supreme Court has so decided in numerous decisions; among them, Snowden vs. Hughes, 321 U. S. 1.

QUESTIONS INVOLVED

Question 1. Should a Michigan citizen, who claims to engage partly in foreign commerce, be wholly free from state regulation.

Answer 1: a. Defendant says yes.

b. Plaintiff says no.

c. The Court thinks the answer is no, provided that such regulations are not a direct burden or do not encroach on Congressional regulation. If they are a valid exercise of police power, affecting outside commerce only incidentally, we believe that anyone in Michigan must obey them or suffer the consequences. South Carolina vs. Branwall Brothers, 303 U. S. 177; Cooley vs. Post Wardens, 12 How. 299, 13 L. Ed. 996. The type of legislative regulation forbidden most of the states must constitute a direct and substantial interference with commerce. U.S.F. & G. vs. Ky., 231 U. S. 394; Boston etc. Rule v. Ambrey, 285 U. S. 234; California vs. Thompson, 313 U. S. 109, 113.

Question 2: Is defendant engaged in foreign commerce?

Answer 2: a. Defendant says yes.

b. Plaintiff says no.

c. The Court's answer is "could be."

Transportation is commerce, but defendant's transportation begins and ends in Michigan though it does go through foreign waters. There is no traffic with foreign nations. [fol. 50] Whether or not that is foreign commerce is questionable.

A decision in each case on whether or not it is interstate or foreign commerce depends on the circumstances of the case. In one Federal case, Covington vs. Kentucky, for example, it was decided that a street car running across a bridge between Kentucky and Missouri was engaged in interstate commerce, because one-way tickets were sold at either end. Here, only roundtrip tickets are sold and must be purchased in Michigan.

Also, in New York Ex. Rel. Cornall vs. Sohmes, Controller, 235 U. S. 548, it was held that a tax on the gross earnings of a steamship can be imposed, but the state of New York was not so burdensome as to encroach on Con-

gressional power when the evidence showed that the only interstate commerce in which the Company indulged was daily trips across the Hudson to New Jersey to pick up tow boats. Every steamer picked up a tow in New Jersey but no one landed there. The termini were all in New York.

Question 3: Assuming that defendant *is* engaged in foreign commerce, has Congress regulated such commerce by allowing or forbidding discrimination on the grounds of race or color to all engaged in such commerce?

Answer 3: Not as far as the Court can discover and defendant cites no such regulation.

Congress, by the Federal Motor Carrier Act, the Maritime Shipping Act and the Interstate Commerce Act, has forbidden unreasonable discrimination to common carriers, whether they are engaged in interstate commerce or in commerce between the United States and an adjacent foreign [fol. 51] country. It has not regulated other carriers on this subject.

The Court does not think that that can be taken to mean that Congress indicates it wishes all other commerce, except by common carrier, to be free to discriminate. On the contrary, we are certain that it means that Congress is always against discrimination but leaves the more local problems to local authorities, even though, incidentally, the regulations may have extra territorial effect.

Question 4: Is the Civil Rights Regulation reasonable?

Answer 4: a. Plaintiff says yes.

b. Defendant says no.

c. The Court thinks that it is reasonable and is in line with all Michigan decisions since the Civil War, as well as the dec-sion of the United States Supreme Court, including the Mitchell case. It is not out of line with any decision.

Question 5: Is the regulation burdensome?

Answer 5: a. Plaintiff says no.

b. Defendant says yes (I assume).

c. The Court feels that it is not burdensome. It is intended to govern intra-state commerce, incidentally, and is reasonable, even though interstate or foreign is effected. The Supreme Court of the United States in Louisville Rail-

road vs. Mississippi, 133 U. S. 589, has upheld a state statute regulating carriers in Mississippi and compelling segregation. This was held not to be burdensome. If it is not burdensome to compel a type of discrimination, it is cer- [fol. 52] tainly not burdensome to compel a citizen to refrain from that type or any type. Defendant will not have to make any change in equipment or any operation in order to obey the statute. All it will have to do, is to treat all citizens and persons, white or colored, alike. No Canadian treaty could interfere with the rights of American citizens against such discrimination. There is no possibility, then, of conflicting authority, which is the basis for calling some regulations burdensome.

Question 6: Does the Civil Rights Statute encroach upon the power of Congress?

Answer 6: a. Plaintiff says no.

b. Defendant says yes.

c. The Court thinks the answer is no. As far as Congress has acted, it has affirmed the theory of the Michigan statute. It has not acted beyond regulating common carriers, except in the passage of the present Federal Civil Rights Act which guarantees "to all persons within the United States, the same right * * * to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." In view of that discrimination, it cannot be said that Congress wishes commerce to be free to discriminate. The Court adds that white citizens are permitted to use defendant's steamers.

Decision on Motion and Verdict

The Court concludes that even if defendant *is* engaged in a very attenuated form of foreign commerce, which is not certain, still the Michigan regulation is valid and applies.

[fol. 53] While the defendant engages in no traffic or intercourse with the citizens of foreign nations and while it sells only round-trip tickets from and to Michigan and deals only with passengers taken on there, still, because it traverses Canadian navigable waters, let us assume it does *some* foreign commerce.

Still, the Civil Rights Statute applies. That statute does *not directly* regulate commerce, except as commerce is one

form of "public accom-odation." It claims no extra territorial effect; though, incidentally, one doing commerce in foreign waters may be affected while in Michigan.

The statute is valid under all decisions. It is a valid exercise of police power. The offense penalized is committed in Michigan. It is not burdensome at all. Defendant would need to make no change, except in policy, to obey it. It regulates one engaged in foreign commerce only incidentally.

It does not encroach on Congressional power over commerce. Congress has only attempted to regulate *common carriers* so as to forbid discrimination.

That leaves the field open to the States to regulate commerce at home against discrimination, even though it may incidentally affect outside commerce.

Congress has indicated its opposition to color discrimination as unreasonable, by common carriers. Certainly that affirmative regulation does not mean that it wishes all the rest of commerce to be free to discriminate unreasonably.

The statute is not a State attempt to favor its own citizens at the expense of other nations and states.

[fols. 54-62] The motion for a directed verdict of not guilty is denied and the defendant (Bob-Lo Excursion Company) is found guilty as charged.

(Signed) John J. Maher, Recorder and Judge.

Dated: November 16, 1945.

[fol. 63] In the Recorder's Court for the City of Detroit

Reasons and Grounds for Appeal and Assignments of Error—Filed April 15, 1946

Now comes the defendant, Bob-Lo Excursion Company by its attorney, Wilson W. Mills, and sets forth the following assignments of error and reasons and grounds for appeal to the Supreme Court of Michigan in this case:

* * * * * * *

3. Because the Court erred in not holding that the said Michigan Civil Rights Statute is void as being a purported state regulation of foreign commerce in violation of the commerce clause of the Constitution of the United States,

to-wit: Article I Sec. 8, (3), thereof, the defendant being engaged in such foreign commerce.

[fol. 64-67] 4. Because the Court erred in not holding that the said Michigan Civil Rights Statute is inapplicable as to defendant as being a purported state regulation of foreign commerce in violation of the commerce clause of the Constitution of the United States, to-wit: Article I Sec. 8, (3), thereof, the defendant being engaged in such foreign commerce.

* * * * * * *

7. Because the Court erred in denying defendant's motion for a verdict of not guilty.

8. Because the Court erred in denying defendant's motion for a judgment of not guilty.

Wilson W. Mills, Attorney for Defendant.

[fol. 68] IN SUPREME COURT OF MICHIGAN

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff and Appellee

v.

BOB-LO EXCURSION COMPANY, a Michigan Corporation, Defendant and Appellant.

OPINION—Filed April 17, 1947

Before the Entire Bench

NORTH, *J.*:

The Bob-Lo Excursion Company, a Michigan corporation, having waived trial by jury was tried in the recorder's court of Detroit and found guilty of having violated the so-called civil rights statute of Michigan (Act No. 117, Pub. Acts 1937; Stat. Ann. 1946 Cum. Supp. § 28.343). From its conviction defendant has appealed.

Defendant admits that in June 1945 its agents compelled a negro girl, the complaining witness herein, to disembark from one of its ships at the wharf in Detroit and denied her accommodations on its ship solely because she was a colored

person. She was tendered repayment of the purchase price of her ticket. For its discriminatory action in refusing passage to the negro girl defendant was prosecuted and convicted under the cited Act. The pertinent portion of the statute reads:

"Sec. 146. All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of * * * public conveyances on land and water * * * and all other places of public accommodation, amusement, and recreation, where refreshments are or may hereafter be served, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices."

Among the various purposes for which defendant was incorporated are; "To lease, own and operate amusement [fol. 69] parks in Canada, and to charter, lease, own and operate excursion steamers and ferry boats in interstate and foreign commerce, together with dock and terminal facilities pertaining thereto." Decision herein presents the question as to whether defendant is engaged in foreign commerce. Defendant asserts that it is so engaged and in consequence thereof defendant claims that the quoted statute is not applicable and that defendant's conviction thereunder was unlawful.

1945 defendant's business was chiefly devoted to transportation of passengers to and from Bob-Lo Island (also known as Bois Blanc) and the operation of facilities for recreation and amusement owned by it on Bob-Lo Island. Except for four lots this Island is owned by defendant. It is a part of the Province of Ontario, Dominion of Canada. Only defendant's ships have access to Bob-Lo Island. Ordinarily these ships make round trips between Detroit and the Island, but occasionally they also make round trips between Windsor, Ontario, and Bob-Lo Island. But defendant does not transport passengers from Canada to Michigan. In traveling between Detroit and the Island defendant's ships cross the international boundary line several times and are in Canadian waters for about a half of the voyage. Defendant's ships are required by federal law to be enrolled by the United States Customs Service, and the enrollment license must be renewed annually. Defendant's commerce activities and ships are subject to regulations

and inspection by the United States Treasury, the United States Immigration Service, the United States Navy Department and the United States Army Engineers. Its ships are also regulated by similar governmental agencies of the Dominion of Canada.

In the case of Gibbons v. Ogden, 9 Wheaton 1, 190 and 195, Chief Justice Marshall speaking for the Supreme Court of the United States, said:

[fol. 70] "All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation. * * *

"But in regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States."

In the case of Lord v. Steamship Co., 102 U. S. 541, the Supreme Court said:

"The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State. It is conceded that while the Ventura carried goods from place to place in California, her voyages were always ocean voyages."

The question was resolved as follows:

"Commerce includes intercourse, navigation, and not traffic alone. * * *

"The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore, the Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the coun-

try whose flag she carried. True, she was not trading with them; but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, *engaged in commerce with* foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress."

In view of the holdings in Gibbons v. Ogden, and Lord v. Steamship Co., supra, and of like holdings in many other cases which might be cited, it must be held in the instant case that the defendant is engaged in foreign commerce. And in the light of that determination decision must be made as to whether the so-called civil rights statute of Michigan, above cited, is valid or at least whether it is applicable to defendant under the facts and circumstances of the instant case. And in turn decision of that issue hinges on whether [fol. 71] the cited Michigan civil rights statute imposes an unreasonable burden on foreign commerce. Since by the Federal Constitution the power to regulate both foreign and interstate commerce is vested in Congress*, due consideration must be given to pertinent decisions of the Supreme Court of the United States. We have so held as to interstate commerce, and that holding is equally applicable to foreign commerce.

"The power given congress by the United States Constitution to regulate commerce among the several States is exclusive, and the decisions of the United States Supreme Court upon that question are controlling." (Syllabus) People v. White, 197 Mich. 263.

Many cases hold that state legislation which unduly burdens interstate or foreign commerce is invalid, even where Congress has not acted. Such is the holding in the very recent decision of the United States Supreme Court in Morgan v. Commonwealth of Virginia, U. S. ; 66

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*U. S. Const., Art. I, § 8.

"The Congress shall have Power . . .

(3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

S. Ct. Rep. 1050. As stated in the headnotes in that case, the court held:

"State legislation or a final court order materially affecting interstate commerce is invalid, even where Congress has not acted.

"Where Congress has not acted, a state may validly enact legislation affecting interstate commerce, where the legislation has predominantly only a local influence on the course of interstate commerce.

"State legislation is invalid if it unduly burdens interstate commerce in matters where uniformity is necessary in the constitutional sense of useful in accomplishing a permitted purpose.

"Because the Constitution puts the ultimate power to regulate interstate commerce in Congress, rather than in the states, the degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the state statute unconstitutional."

[fol. 72] We have given careful consideration to the various decisions upon which defendant relies, particularly Hall v. DeCuir, 95 U. S. 485; Pryce v. Swedish-American Lines, 30 Fed. Supp. 371; Henderson v. New York, 92 U. S. 259; and Board of Trustees v. United States, 289 U. S. 48. However, we are of the opinion that each of the above cases either by reason of the factual background or the legal issue involved must be distinguished from the instant case. In the Hall-Decuir case, the court based decision upon the assumption that by reason of traversing the waters of various states and stopping at ports in such states the carrier might meet with statutory requirements of various types, and with which the Louisiana statute might be in conflict and compliance with both would be quite impossible. Under such circumstances the court held invalid the Louisiana statute which required "those engaged in inter-state commerce to give all persons travelling in that State, upon the public conveyance employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color." Obviously the carrier in the instant case is not in its business confronted with the circumstances which led the court in the Hall-DeCuir case to hold that the Louisiana statute

imposed an undue burden upon interstate commerce. In the instant case it quite conclusively appears that defendant in carrying on its commerce or transportation will not be subjected to an undue burden arising from conflicting regulations by being required to render its services alike to both white and colored persons.

Pryce v. Swedish-American Lines, supra, is not a decision of a court of last resort and the court seems to have rather summarily based its decision, so far as its application to the instant case is concerned, upon the holding in Hall v. DeCuir, just above considered. Decisions in Henderson v. [fol. 73] New York, supra, and Board of Trustees v. United States, supra, are not particularly applicable to the instant case. Neither involved discrimination based on race or color. In effect the Henderson decision was merely that a state is without power to impose unreasonable requirements or a tax upon foreign commerce. And the holding in Board of Trustees v. United States was merely to the effect that "States and their instrumentalities" are not "relieved of the duties on articles imported by them" in foreign commerce.

The decisions cited by defendant are not controlling of the instant case unless it appears that the Michigan civil rights act imposes an undue burden on the foreign commerce in which defendant is engaged. That issue is material to decision the instant case. But we are of the opinion that holding the provisions of the Michigan statute effective and applicable in the instant case results only in this, defendant will be required in operating its ships as "public conveyances" to accept as passengers persons of the negro race indiscriminately with others. Our review of this record does not disclose that such a requirement will impose any undue burden on defendant in its business in foreign commerce. As applied to the facts in the instant case the Michigan civil rights statute is neither in derogation of or in conflict with pertinent federal regulations. Instead the mandate of the Michigan statute is in accord with the federal civil rights act, which contains the following:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit

of all laws and proceedings for the security of persons and property as is enjoyed by white citizens * * *." R. S. § 1977; U.S.C.A., Title 1, § 41.

While literally the provision of the interstate commerce act about to be noted applies to common carriers, nonetheless it is indicative of the character of federal regulations [fol. 74] in this field of the law. The interstate commerce act prohibits common carriers from subjecting any person "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." See paragraph 1, § 3 of the interstate commerce act, U.S.C.A., Title 49. Referring to the above provision the United States Supreme Court has said:

> "Paragraph 1 of §3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act 'to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' 49 U.S.C. 3. From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race and the duty of carriers to provide equality of treatment with respect to transportation facilities; that is, that colored persons who buy first-class tickets must be furnished with accommodations equal in comforts and conveniences to those afforded to first-class white passengers." Mitchell v. United States, 313 U. S. 80, 95.

There is no escape from the conclusion that defendant herein is engaged in the business of operating "public conveyances" by water, and the Michigan statute provides: "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations" afforded by such conveyances. The Michigan enactment has been held constitutional. Bolden v. Operating Corporation, 239 Mich. 318. Our conclusion is not only that the Michigan civil rights act is constitutional but that it is applicable to the business carried on by defendant; and further that it does not impose an undue burden on defendant's commerce activities.

In arriving at the above conclusion we are mindful of our decision in Meisner v. Detroit, Belle Isle & Windsor

Ferry Co., 154 Mich. 545, wherein the present defendant's corporate predecessor was defendant. It was there held that the defendant engaged in the same business activities as defendant in the instant case, "is not, as to the enterprise named, a common carrier, and it may refuse to carry to [fol. 75] such park anyone at its pleasure." But the holding in the cited case is not controlling in the instant case because the former decision turned solely on the holding that the defendant therein was not a common carrier. The report of the Meisner decision states: "The action is in tort, alleging a breach of defendant's duty *as a common carrier* of passengers." It does not appear in the Meisner case that plaintiff asserted a right under the Michigan civil rights statute; whereas in the case at bar that statute is of controlling importance. In the instant case decision is not controlled by defendant's being or not being a common carrier. Whatever its classification in that respect may be, it unequivocally appears from the record that it operates "public conveyances on * * * water" and that such operations have their inception in this State, wherein the statute provides all persons within the jurisdiction of the State shall be entitled to full and equal accommodations of such public conveyances. It is not amiss to note that one may be engaged in interstate or foreign commerce notwithstanding he is not a common carrier. An example of such a status is found in the operators of trucks who are contract carriers. But such carriers upon crossing State lines become engaged in interstate commerce, and upon crossing National lines become engaged in foreign commerce. Nonetheless they are not common carriers. Michigan Public Utilities Commission v. Duke, 266 U. S. 570.

The law of interstate commerce, but applicable alike to foreign commerce, in the light of which the instant case must be decided, with numerous supporting citations, is stated in 15 C. J. 5, 268, as follows:

> "However, the constitutional grant to Congress of power to regulate interstate commerce, although operating of its own force to curtail state power in some measure, does not forestall all state action affecting interstate commerce; it does not withdraw from the states power to legislate in respect of their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce. Although state

legislation affects interstate commerce incidentally, indirectly, or remotely, yet where it does not undertake [fol. 76] to regulate such commerce and is no more than a bona fide, legitimate, and reasonable exercise of the reserved police power of the state in respect of a matter of local or internal concern, it is valid and * * * will stand, in the absence of conflicting and superseding legislation by Congress in the exercise of its superior authority to regulate commerce among the states."

The decision of the lower court is affirmed.

Signed: Walter H. North, John R. Dethmers, Neil E. Reid, Edward M. Sharpe, Henry M. Butzel, Leland W. Carr, George E. Bushnell, Emerson R. Boyles.

[File endorsement omitted]

[fol. 77] IN THE SUPREME COURT OF MICHIGAN

43302

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff,

vs.

BOB-LO EXCURSION COMPANY, Defendant

JUDGMENT—April 17, 1947

The record and proceedings in this cause having been brought to this Court by appeal from the Recorder's Court of the City of Detroit, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Recorder's Court of the City of Detroit, there is NO ERROR. Therefore it is ordered and adjudged that the judgment of said Recorder's Court of the City of Detroit be and the same is hereby in all things affirmed.

[fol. 78] IN SUPREME COURT OF MICHIGAN

[Title omitted]

APPLICATION FOR REHEARING—Filed May 6, 1947

Now comes the above defendant and respectfully moves the court for a rehearing herein for the following reasons: (1) The opinion of this court handed down April 17, 1947 misconstrued the parallel facts of the controlling case, viz., *Hall v. DeCuir*, 95 U. S. 485 and the case at bar, and consequently the Michigan Civil Rights statute contravenes the commerce clause of the federal constitution—Article I, Sec. 8, (3) when applied to this defendant in its foreign [fol. 79] commerce: and (2) the opinion of this court may have assumed the federal equal rights act applying to interstate railroads also applies to purely water carriers in interstate or foreign commerce.

Respectfully submitted, Wilson W. Mills, Counsel for Defendant, 1712 Ford Building, Detroit 26, Michigan.

[fol. 80] BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

As stated in the court's opinion, defendant being engaged in foreign commerce this court is controlled by the decisions of the Supreme Court of the United States upon that question. They are binding on this Court. *People v. White*, 197 Mich. 283; *Smart v. Florida, etc. Ry.*, 240 Mich. 542.

I

The controlling opinion of the federal Supreme Court is *Hall v. DeCuir*, 95 U. S. 485. It has consistently been followed by that court for seventy years, the last such occasion being June 1946. It is very respectfully submitted this court erred in its opinion as to the parallel facts and law therein and herein. No two cases could be more similar. In DeCuir the fact was the vessel operated on the Mississippi River, in the case at bar on the Detroit River (as pointed out in DeCuir and in defendant's original brief both rivers and their connecting waters carry enormous traffic, and each serve as boundaries to some ten states and/or foreign countries): In DeCuir the vessel's maximum total run was between New Orleans, Louisiana, and Vicksburg,

Mississippi, *it being impossible for that vessel on its total run to be in waters of more than two states,* in the case at bar total run is between Michigan and Ontario—but note this added factor, part of the run and one terminus is in Canada, a foreign country, which important fact was not present in DeCuir: In DeCuir the vessel might have been [fol. 81] subject to regulation by two states (but only one had assumed to act), in the case at bar one state has acted, but one province and a foreign country have a right to so act. The stricken Louisiana statute was for all practical purposes identical with the Michigan Act. How then can it be said that in DeCuir "The court based decision upon the assumption that by reason of traversing the waters of various states * * * the carrier might meet with statutory requirements of various types, and with which the Louisiana statute might be in conflict and compliance with both would be quite impossible," *and not say precisely the same as to the case at bar?* Defendant here is confronted with an identical burden, a similar statute, the identical possibility of Ontario and/or Canadian contrary regulation which existed from the state of Mississippi in the DeCuir case, but to a somewhat greater extent here because Ontario or Canada may lawfully regulate traffic on her waters and her island—while therein Mississippi could not constitutionally do so. Again how may it be said in the absence of gazing into a crystal globe that this "defendant in carrying on its commerce or transportation will not be subjected to an undue burden arising from conflicting regulations." Louisiana had its statute like Michigan—Mississippi had passed no contradictory regulation—the mere *possibility* that Mississippi *might* do so was a causation leading to the invalidation of the Louisiana statute. So likewise here, the province of Ontario or the Dominion of Canada may, indeed *it has the right* (which Mississippi did not have constitutionally) to make valid regulations in utter conflict with Michigan's statute.

The Court's opinion indicates a greater burden existed on interstate commerce in DeCuir than in the case before us. It is respectfully submitted this is not the case, for the Louisiana and Michigan statutes are practically identical; [fol. 82] in DeCuir the vessel's total run was only between only two states, and in our case between one country and another. A New York statute was stricken which gave no greater burden, *Pryce v. Swedish American Line,* 30 Fed.

Supp. 371. So too in *Morgan v. Virginia*, 66 Supreme Court Reporter 1050, the only burden was that contiguous bus seats be not occupied at the same time by persons of different races. There all the carrier would have had to do would be to re-seat its passengers (if even that became necessary) upon crossing the Virginia line. But even this was held to be an undue and unconstitutional burden. One of the opinions in the Morgan case states moreover the result would be to make the Michigan statute inoperative as applied to interstate commerce (p. 14 of opinion).

II

This court on page 7 of its opinion quotes from *Mitchell v. U. S.*, 313 U. S. 80. Fearing this court might have been led to the belief the federal statute there involved covered water carriers, defendant points out that the Mitchell case involved an interstate *railroad* for which type of carrier Congress has passed its own civil rights act. Congress has also so regulated interstate passenger common carriers by water if they have a joint tariff with a railroad, but it is admitted by counsel that Congress has not passed any such regulation for interstate water passenger carriers as defendant (it having no joint tariff, etc.) nor for interstate passenger motor vehicles, and for such water carriers, and for such motor carriers the Supreme Court of the United States has held (in the DeCuir case for vessels and in the Morgan case for motor vehicles) that lack of regulation by Congress is a declaration that they be kept free of such state regula-[fols. 83-84] tion, and consequently any such attempted state regulation is invalid.

This Court's opinion states the Michigan Statute "is in accord with the Federal Civil Rights Act." The two statutes are most dissimilar as to the matters sought to be regulated, the Federal act covering political rights alone, the State act other matters. The writer has been unable to locate any Congressional Civil Rights Act similar to the Michigan statute applying even to the District of Columbia. On the contrary there is an act applying to the District under which white and colored children may not attend the same public schools.

Respectfully submitted, Wilson W. Mills, Counsel for Defendant, 1712 Ford Building, Detroit 26, Michigan.

[fol. 85] IN SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—June 12, 1947

A motion for rehearing having been heretofore submitted herein, it is hereby denied.

[fol. 86] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 87] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Stanley F. Reed, Associate Justice of the Supreme Court of the United States:

Now comes Bob-Lo Excursion Company, petitioner, defendant and appellant and represents:

I

That on April 17, 1947 the Supreme Court of the State of Michigan affirmed the conviction of defendant upon the matters hereinafter mentioned, and thereafter in due season defendant applied for a rehearing, which was denied by said Court on June 12, 1947.

II

This action before the Supreme Court of the State of Michigan was upon appeal by the defendant to review its conviction and the levying of a fine against it, which conviction was had and fine was imposed by the Recorder's Court for the City of Detroit, Michigan. The offense of which defendant was found guilty was an alleged violation of the "Civil Rights" Statute of Michigan, Act 117, P. A. 1937, Stat. Ann. 1946 Cum. Supp. Sec. 28.343.

III

Petitioner Bob-Lo Excursion Company is a corporation organized and existing under the laws of the State of Michigan and as stated in the opinion of the Supreme Court of Michigan, 317 Mich. 686, its "business was chiefly devoted to transportation of passengers to and from Bob-Lo Island (also known as Bois Blanc) and the operation of facilities for recreation and amusement owned by it on Bob-Lo Island. Except for four lots this Island is owned by defendant. It is a part of the Province of Ontario, Dominion of Canada. Only Defendant's ships have access to Bob-Lo Island. Ordinarily these ships make round trips between Detroit and the Island, but occasionally they also make round trips between Windsor, Ontario, and Bob-Lo Island, but defendant does not transport passengers from Canada to Michigan. In traveling between Detroit and the Island defendant's ships cross the international boundary line several times and are in Canadian waters for about a half of the voyage. Defendant's ships are required by federal law to be enrolled by the United States Customs Service, and the enrollment license must be renewed annually. Defendant's [fol. 88] commerce activities and ships are subject to regulations and inspection by the United States Treasury, the United States Immigration Service, the United States Navy Department and the United States Army Engineers. Its ships are also regulated by similar governmental agencies of the Dominion of Canada." In June 1945 defendant refused to transport a negro girl upon one of its vessels from its dock at Detroit, Michigan, to Bob-Lo Island, Ontario, Canada, because she was a colored person. She was tendered repayment of the purchase price of her ticket which she refused. For defendant's refusal of passage as aforesaid to the said negro girl defendant was prosecuted convicted and fined under the provisions of the above mentioned Civil Rights Act.

IV

In said cause there was drawn in question the validity of a statute of the State of Michigan, viz: the above mentioned "Civil Rights" Act, on the grounds of it being repugnant to the Constitution, laws or treaties of the United States and the decision was in favor of its validity. Petitioner claims the said Michigan "Civil Rights" Act is invalid or at least

may not be constitutionally applied to defendant under the facts and circumstances of the instant case for the reason that in either case the said Act would

(a) constitute an undue and unconstitutional regulation by the State of Michigan of the foreign commerce being engaged in by appellant in violation of Article I, Sec. 8, Clause 3, of the Constitution of the United States; and

(b) result in depriving defendant and appellant of its property without due process of law and depriving defendant and appellant of the equal protection of the laws in violation of sec. 1 of the 14th Amendment to the Constitution of the United States; and

(c) the effect of the decision of the Supreme Court of Michigan herein is to convert defendant from a private carrier to a common carrier or to a public conveyance by water, thus depriving defendant and appellant of its property without due process of law and depriving it of the equal protection of the laws all in violation of sec. 1 of the 14th Amendment to the Constitution of the United States.

V

Petitioner claims the said Michigan "Civil Rights" Act so far as it applied to it in its business as aforesaid is unconstitutional in that it is an improper interference with and regulation of foreign commerce by the state of Michigan and thereby violates the power of Congress to regulate foreign commerce as provided in Article I, Sec. 8, Clause 3 of the Constitution of the United States; and likewise that said Civil Rights Act is unconstitutional in that it deprives petitioner of its property and deprives it of the equal protection of the laws both as guaranteed to it by sec. 1 of the 14th Amendment to the Constitution of the United States.

[fol. 89]

VI

Petitioner claims that the said "Civil Rights" Act contravenes Article I, Sec. 8, (3) of the Constitution of the United States and contravenes Sec. 1 of the 14th Amendment of the Constitution of the United States. These claims were raised and over ruled in the Recorder's Court for the City of Detroit, that being the Court of first instance, and thereafter

in an appeal to the Supreme Court of the State of Michigan defendant and appellant filed the same claims and contentions for an appeal and as its reasons and grounds for the said appeal and assignments of error, and said questions were brought and raised before the Supreme Court of Michigan in the manner and form required under the practice of said Court, and which satisfied all of the requirements; and certain of the said federal questions were necessarily considered at length by the said Supreme Court of the State of Michigan; and all of said contentions and objections of defendant and appellant were expressly over ruled in the opinion rendered by the said Supreme Court of Michigan, and in the judgment entered thereon.

VII

Your petitioner further avers that in the last aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner all of which more fully apear from the assignment of errors which is filed herewith.

Wherefore, petitioner prays for the allowance of an appeal from the Supreme Court of the State of Michigan, the highest court of said State, to the Supreme Court of the United States in order that the decision of the Supreme Court of the State of Michigan may be examined and reversed. It also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Michigan, may be sent to the Supreme Court of the United States as provided by law. It also prays the appeal act as a supersedeas, and for an order touching the security to be required of it and the approval thereof.

The errors upon which your petitioner claims to be entitled to an appeal are those above indicated, and more fully set out in the assignment of errors filed herewith.

Wilson W. Mills, Attorney for Petitioner Defendant and Appellant, Bob-Lo Excursion Company, 1712 Ford Building, Detroit 26, Michigan.

[fol. 90] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The said Bob-Lo Excursion Company, defendant and appellant, assigns the following errors in the record and proceedings in the said case:

1. The Supreme Court of the State of Michigan erred in its decision and judgment in holding the Michigan "Civil Rights" Act as amended, (Act 117, P.A. 1937; sec. 17115-146, 7 Mason's 1940 Cumulative Supplement; Stat. Ann. 1946 Cum. Supp. Sec. 28.343,4) was valid and in holding the same was applicable to defendant when engaged in foreign commerce, on account of the provisions of Art. I, Sec. 8, (3) of the Constitution of the United States, under which the said Michigan "Civil Rights" Act is either unconstitutional or at least may not constitutionally be applied to defendant when engaged in such foreign commerce, and which decision is hereby assigned as error.

2. The Supreme Court of the State of Michigan erred in its decision and judgment in holding that the aforesaid Michigan "Civil Rights" Act as amended was valid and enforcible as against this defendant when engaged in foreign commerce, in that under Article I, Sec. 8 (3) of the Constitution of the United States, such foreign commerce may not be regulated by the State of Michigan but is solely under the jurisdiction of the Congress of the United States, and the said Supreme Court of Michigan erred in not holding said Act may not constitutionally be applied to defendant when engaged in foreign commerce, or in not holding said act was invalid under said provision of the Constitution of the United States if so applied, and which decision is hereby assigned as error.

[fol. 91] For which errors defendant and appellant prays that the said judgment of the Supreme Court of the State of Michigan dated April 17, 1947 and on which application for rehearing was denied on June 12, 1947 in the above entitled cause be reversed and a judgment rendered in favor of the said defendant and appellant.

Dated Aug. 18, 1947.

Wilson W. Mills, Counsel for Appellant, 1712 Ford Building, Detroit 26, Michigan.

[fol. 92] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—August 21, 1947

The petition of defendant and appellant herein for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Michigan, and the assignment of errors, and statement disclosing basis of appellate jurisdiction upon appeal as required by United States Supreme Court Rule #12, being filed therewith, and the record of said cause having been considered, it is

Ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the State of Michigan, as prayed in said petition, and that the clerk of the Supreme Court of the State of Michigan shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within thirty-five days from the date hereof.

It is further ordered that said defendant and appellant shall give good and sufficient security in the sum of Five Hundred Dollars ($500.00), that said appellant shall prosecute said apeal to effect, and if said appellant fails to make his plea good, he shall answer all damages and costs.

The said appellant now presenting a bond in the sum of Five Hundred Dollars ($500.00), it is

Ordered that the same be, and is hereby, approved.

The appeal shall operate as a supersedeas.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated: August 21, 1947.

[fol. 93] Citation in usual form omitted in printing.

[fols. 94-96] Supersedeas and Cost Bond on Appeal for $500.00 approved Aug. 21, 1947 omitted in printing.

[fol. 97] IN SUPREME COURT OF MICHIGAN

[Title omitted]

PRAECIPE OF DEFENDANT AND APPELLANT INDICATING PORTIONS OF RECORD TO BE INCORPORATED INTO TRANSCRIPT OF RECORD

To Jay Mertz, Esq., Clerk, Supreme Court of Michigan:

SIR:

Pursuant to Rule 10, paragraph 2, Revised Rules of the Supreme Court of the United States the undersigned on behalf of defendant and appellant herein hereby indicates that the following portions of the record herein *is* to be incorporated into the transcript and forwarded (prior to the return date of the citation filed herein) to the Clerk of the Supreme Court of the United States under your hand and the seal of the Supreme Court of Michigan, to wit:

1. Warrant.
2. Bill of Exceptions.
3. Motion for entry of Judgment of not guilty.
4. Motion for Verdict of not guilty.
5. Motion for New Trial.
6. Decision on Motion and Verdict i.e., (Opinion of trial court).
7. Order permitting appeal to Supreme Court of Michigan.
8. Reasons and grounds for Appeal to Supreme Court of Michigan and Assignment of Errors.
9. Opinion of Supreme Court of Michigan.
10. Judgment of Supreme Court of Michigan (Dated April 17, 1947).
11. Application for Rehearing.
12. Order denying Application for Rehearing (Dated June 12, 1947).
13. Petition for Appeal to Supreme Court United States.
14. Order Allowing Appeal.
15. Assignment of Errors.
16. Citation.
17. Supersedeas and Cost Bond.
18. Statement disclosing basis of appellate jurisdiction upon appeal.

19. Statement directing attention to the provisions of Rule 12, paragraph 3 Revised Rules of the Supreme Court of the United States.

[fol. 98] 20. Acknowledgment by Appellee of service of papers on appeal to Supreme Court of the United States.

21. This Praecipe and acknowledgment of service thereof.

Yours, etc., Wilson W. Mills, Attorney for Defendant and Appellant, 1712 Ford Building, Detroit 26, Michigan.

I hereby acknowledge service upon me of a copy of the above praecipe this 27th day of August, 1947.

James N. McNally, By Herbert Burdick, Attorney for Plaintiff & Appellee and Prosecuting Attorney Wayne County, Michigan.

Proof of Service

STATE OF MICHIGAN,
County of Wayne, ss:

Vera Broeg being duly sworn deposes and says she is employed by Wilson W. Mills, attorney for defendant herein and that on August 27, 1947 she served a true copy of Praecipe of defendant and appellant indicating portions of record to be incorporated into transcript of record, upon the Attorney General of Michigan by handing said true copy to Ben H. Cole, Assistant Attorney General of the State of Michigan.

Further deponent saith not.

Vera Broeg.

Subscribed and sworn to before me this 27th day of August, A. D. 1947. Roy H. Lockwood, Notary Public, Wayne County, Michigan. My commission expires Aug. 5, 1950. (Seal.)

[fol. 99] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 100] UNITED STATES OF AMERICA

SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS INTENDED TO BE RELIED UPON BY APPELLANT AND PARTS OF RECORD TO BE PRINTED PURSUANT TO RULE 13, PARAGRAPH 9, REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES; TOGETHER WITH PROOF OF SERVICE OF SAME—Filed October 3, 1947

Bob-Lo Excursion Company, a Michigan corporation, defendant and appellant, in pursuance of Rule 13, Paragraph 9 Revised Rules of the Supreme Court of the United States, does hereby state that in the appeal it intends to rely upon the points of law set forth in paragraphs 1 and 2 of its Assignment of Errors filed in this court and cause, to wit:

I

The Supreme Court of the State of Michigan erred in its decision and judgment in holding the Michigan "Civil Rights" Act as amended, (Act 117, P. A. 1937; sec. 17115-146, 7 Mason's 1940 Cumulative Supplement; Stat. Ann. 1946 Cum. Supp. Sec. 28.343, 4) was valid and in holding the same was applicable to defendant when engaged in foreign commerce, on account of the provisions of Art. I, Sec. 8 (3) of the Constitution of the United States, under which the said Michigan "Civil Rights" Act is either unconstitutional or at least may not constitutionally be applied to defendant when engaged in such foreign commerce.

II

The Supreme Court of the State of Michigan erred in its decision and judgment in holding that the aforesaid Michigan "Civil Rights" Act as amended was valid and enforcible as against this defendant when engaged in foreign commerce, in that under Article I, Sec. 8 (3) of the Constitution of the United States, such foreign commerce may not be regulated by the State of Michigan but is solely under the jurisdiction of the Congress of the United States, and the said Supreme Court of Michigan erred in not holding said Act may not constitutionally be applied to defendant when engaged in foreign commerce, or in not holding said act

was invalid under said provision of the Constitution of the United States if so applied.

III

Appellant further states that it intends to rely upon the following portions of the record which it thinks necessary [fol. 101] for consideration in the determination of this case upon appeal:

1. Warrant.
2. Bill of Exceptions.
3. Motion for Entry of Judgment of Not Guilty, *except* paragraphs numbered (1), (4), and (5) thereof.
4. Reasons and Grounds for Appeal (to Supreme Court of Michigan) and Assignments of Error, *except* paragraphs numbered (1), (2), (5), (6), and (9) thereof.
5. Opinion of the Supreme Court of Michigan (North, J.).
6. Judgment of the Supreme Court of Michigan.
7. Application for Rehearing.
8. Order denying Application for Rehearing.
9. Petition for Appeal to Supreme Court of the United States.
10. Order Allowing Appeal to Supreme Court of the United States.
11. Assignment of Errors, *except* paragraphs (3), (4), and (5) thereof.
12. Praecipe of Defendant and Appellant indicating portions of record to be incorporated into transcript thereof to be forwarded Clerk, Supreme Court of the United States.
13. This Statement of Points to be relied upon, and Designation of Parts of Record to be Printed.

Richard E. Cross, Attorney for Defendant & Appellant, 4200 Penobscot Building, Detroit 26, Michigan; Wilson W. Mills, Of Counsel, 1712 Ford Building, Detroit 26, Michigan.

[fol. 102] UNITED STATES OF AMERICA

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM 1947

Number 374

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff and Appellee,

vs.

BOB-LO EXCURSION COMPANY, a Michigan Corporation, Defendant and Appellant

STATE OF MICHIGAN,
County of Wayne, ss:

Vera Broeg being duly sworn deposes and says she is employed by Wilson W. Mills and that on September 30, 1947 she served a true copy of the foregoing "Statement of Points Intended to be Relied upon by Appellant and Parts of Record to be Printed Pursuant to Rule 13, Paragraph 9 Revised Rules of the Supreme Court of the United States," upon Eugene F. Black Attorney General of Michigan, Edmund E. Shepherd, Solicitor General, and Daniel J. O'Hara, Assistant Attorney General, by mailing a true copy thereof in an envelope with the postage thereon fully prepaid and addressed to the said Eugene F. Black (marked for the attention of said Edmund E. Shepherd) and addressed to him at his office to wit: Capitol Building, Lansing (2), Michigan.

Further deponent saith not.

Vera Broeg.

Subscribed and sworn to before me this 30th day of September A. D. 1947. Roy H. Lockwood, Notary Public, Wayne County, Michigan. My comm. expires: Aug. 7, 1950.

[fol. 102a] [File endorsement omitted.]

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 27, 1947

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsed:] File No. 52,604, Michigan Supreme Court, Term No. 374. Bob-Lo Excursion Company, Appellant, vs. The People of the State of Michigan. Filed September 26, 1947. Term No. 374 O. T. 1947.

(3222)

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 374

BOB-LO EXCURSION COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

STATEMENT AS TO JURISDICTION

RICHARD E. CROSS,
WILSON W. MILLS,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 374

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff and Appellee,

vs.

BOB-LO EXCURSION COMPANY, a Michigan Corporation,
Defendant and Appellant.

STATEMENT DISCLOSING BASIS OF APPELLATE JURISDICTION UPON APPEAL AS REQUIRED BY SUPREME COURT RULE No. 12.

Pursuant to Rule 12, paragraph 1, Revised Rules of the Supreme Court of the United States, the above defendant files this its statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question of the Supreme Court of Michigan:

I.

The statutory provisions believed to sustain appellate jurisdiction are Sec. 237 (a) of the Judicial Code Act of

1d

February 13, 1925; Chapter 229, 43 Stat. 936; as amended by Act of January 31, 1928, Chapter 14, 45 Stat. 54; Act of April 26, 1928, Chapter 440, 45 Stat. 466 (Judicial Code, Sec. 237, U. S. Code Annotated, Title 28, Sec. 344 (a)), which provide in effect that the Supreme Court of the United States may upon appeal review a final judgment of the Supreme Court of Michigan, which is the highest court of that state, where there has been drawn in question the validity of a statute of the State of Michigan on the ground that it is repugnant to the Constitution of the United States (Article I, Section 8, (3); and Sec. 1 of the XIV Amendment), and the decision of the Supreme Court of the State of Michigan is in favor of the validity of the State statute. *Morgan* v. *Virginia*, 66 Sup. Ct. Rep. 1050 (June 3, 1946); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761; *Detroit International Bridge* v. *Corporation Tax Appeal Board*, 294 U. S. 83.

II.

The statute of the State of Michigan the validity of which is involved is the Michigan "Civil Rights" Act so-called as amended (Act 117, P. A. 1937; Sec. 17115-146, 7 Mason's Cumulative Supplement; Stat. Ann. 1946 Cum. Supp. Sec. 28.343, 4). This act provides that equal accommodations, facilities, etc., shall be furnished by amongst others "public conveyances on land and water" and that no discrimination shall be shown by such conveyances on account of race, creed or color. Penalties by fine or imprisonment or both are provided for violation

III.

The nature of the case and the rulings of the court to bring the case within the aforesaid jurisdictional requirements are as follows, viz: In 1945 the defendant refused to carry a colored girl, and because she was colored, upon one

of its vessels from its dock at Detroit, Michigan, to Bob-Lo Island, Ontario, Canada. It tendered to her in repayment the price of the ticket which she refused. For its action in refusing her passage defendant was prosecuted, convicted and sentenced under the above "Civil Rights" Act. The defendant is organized as a Michigan corporation for profit, is not a common carrier, and its principal business consisted, as set forth in the opinion of the Supreme Court of Michigan, in the transportation of passengers from Detroit upon the Detroit River "to and from Bob-Lo Island (also known as Bois Blanc) and the operation of facilities for recreation and amusement owned by it on Bob-Lo Island. Except for four lots this Island is owned by defendant. It is a part of the Province of Ontario, Dominion of Canada. Only defendant's ships have access to Bob-Lo Island. Ordinarily these ships make round trips between Detroit and the Island, but occasionally they also make round trips between Windsor, Ontario, and Bob-Lo Island. But defendant does not transport passengers from Canada to Michigan. In traveling between Detroit and the Island defendant's ships cross the international boundary line several times and are in Canadian waters for about a half of the voyage. Defendant's ships are required by federal law to be enrolled by the United States Customs Service, and the enrollment license must be renewed annually. Defendant's commerce activities and ships are subject to regulations and inspection by the United States Treasury, the United States Immigration Service, the United States Navy Department and the United States Army Engineers. Its ships are also regulated by similar governmental agencies of the Dominion of Canada."

The above business of defendant is foreign commerce, *Gibbons* v. *Ogden*, 9 Wheaton 1; *Lord* v. *Goodall S. S. Co.*, 102 U. S. 541; *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S.

617; *Edwards* v. *California*, 314 U. S. 160, and the Supreme Court of Michigan so held in its opinion.

IV.

The defendant being so engaged in foreign commerce it is contended in its behalf that the above mentioned "Civil Rights" Act of Michigan is void or at least may not constitutionally be applied to defendant when so engaged in such foreign commerce, *Hall* v. *DeCuir*, 95 U. S. 485. No two cases could be more similar. There a statute of Louisiana was for all practical purposes identical with the Michigan statute here involved. There defendant's vessel plied on the Mississippi River from New Orleans, Louisiana, to a point in the state of Mississippi (two states). In the case at bar the vessel plied on the Detroit River from Michigan to a point in Canada (two countries). There a colored person sought to take passage between two points each in Louisiana (the vessel however touching during such voyage at an intermediate landing in Mississippi), she was refused transportation and the action followed. Here a colored person was refused such passage between Michigan and Ontario, Canada. The Supreme Court of the United States found the Louisiana statute to be void as an unconstitutional regulation by the State of Louisiana of interstate commerce. The Michigan Supreme Court found the Michigan statute valid even as to those engaged in foreign commerce. The opinion of the Supreme Court of Michigan in discussing the *DeCuir* case observed that there "The court based decision upon the assumption that by reason of traversing the waters of various states and stopping at ports in such States" (two states only) "The carrier might meet with statutory requirements of various types, and with which the Louisiana statute might be in conflict and compliance with both would be quite impossible." So too in the case before us, the vessel

stops at ports in two countries, and defendant herein is confronted with a similar statute, an identical burden, and the identical possibility of Ontario and/or Canadian contrary regulation which existed from the state of Mississippi in the *DeCuir* case, but to a somewhat greater extent here because Ontario or Canada may lawfully regulate traffic on her waters and her island—while therein Mississippi could not constitutionally do so. Again how may it be said in the absence of gazing into a crystal globe as was stated in the opinion of the Supreme Court of Michigan that this "defendant in carrying on its commerce or transportation will not be subjected to an undue burden arising from conflicting regulations." Louisiana had its statute like Michigan—Mississippi had passed no contradictory regulation—the mere *possibility* that Mississippi *might* do so was the causation leading to the invalidation of the Louisiana statute. So likewise here, the province of Ontario or the Dominion of Canada may, indeed *have the right* (which Mississippi did not have constitutionally) to make valid regulations in utter conflict with Michigan's statute. From the very nature of things (commerce between two *countries*), the matter becomes national and beyond the scope of the state.

The case of *Hall* v. *DeCuir, supra,* has been consistently followed by the Supreme Court of the United States for seventy years, the last or one of the last of such occasions being in June, 1946, where a Virginia statute requiring that contiguous seats on interstate buses should not be occupied at the same time by persons of different races was held to be invalid under the commerce clause as burdening interstate commerce, *Morgan* v. *Virginia,* 66 Sup. Ct. Rep. 1050. Congress has not acted to regulate as to carriage of colored in interstate or foreign commerce of either bus lines (Morgan case) or water carriers such as defendant who does not

carry freight and who maintains no joint through rate with a railroad or other carrier. In the *Morgan* case all the majority opinions relied heavily on *Hall* v. *DeCuir* as being controlling. In the latter case Mr. Justice Burton filed a dissenting opinion holding the statute valid and remarking that the opinions of the majority of the court might lead to questioning the validity of such statutes as Michigan's "Civil Rights" Act. That very question is now before us. A New York statute (upon which the Michigan statute was based) was likewise stricken as to those engaged in foreign commerce as being violative of the commerce clause, *Pryce* v. *Swedish American Lines*, 30 Fed. Sup. 371; see also *Henderson* v. *N. Y.*, 92 U. S. 259; *Board of Trustees* v. *U. S.*, 289 U. S. 48.

That there is a substantial federal question necessarily involved as to the validity of any such state legislation attempting to so regulate foreign commerce is indubitable, witnesseth practically identical statutes and facts involved in *Hall* v. *DeCuir* and *Pryce* v. *Swedish American Lines, supra.* The same principle and theory was likewise applied in *Morgan* v. *Virginia, supra.* The opinion herein of the Michigan Supreme Court is almost exclusively devoted to this federal question. The Michigan statute contains provisions for fines or imprisonment or both for its violation.

V.

Secondarily, defendant also contends said Michigan "Civil Rights" statute violates Sec. 1 of the 14th Amendment to the Constitution of the United States in that the said statute deprives defendant of its property without due process of law and deprives defendant of the equal protection of the laws. For the state to require defendant (not being a common carrier) to carry all persons without regard to race or color is to substitute the judgment of the State as to

the management of its business for its own judgment; for the state to regulate and control the conduct of a private business (for defendant is not a common carrier, *Meisner* v. *Detroit, Belle Isle & Windsor Ferry Co.*, 154 Mich. 545). See also *Public Utilities Commission* v. *Duke*, 266 U. S. 570; *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522; *Tyson* v. *Benton*, 273 U. S. 418. This too is a substantial federal question.

VI.

Defendant's claims and contentions that the Michigan "Civil Rights" Act violates the two named provisions of the Constitution of the United States, i.e., the Commerce Clause (Art. I, Sec. 8 (3)) and Sec. 1 of the 14th Amendment, were raised in the Court of first instance that being the trial court, by motion for directed verdict of not guilty (Michigan Supreme Court printed record p. 20 (hereafter designated as M. S. C.)), and by motion for entry of judgment of not guilty (M. S. C. 24), and by motion for a new trial therein seasonably made (M. S. C. 25), all of said motions attacking the said "Civil Rights" Act *inter alia*, as being violative of the commerce clause and of the 14th Amendment. All of defendant's said motions were denied and in due season and according to the practice of the State of Michigan defendant filed an application for leave to appeal to the Supreme Court of the State of Michigan (M. S. C. 54) and also filed its assignment of errors therein (M. S. C. 63). Both the application for leave to appeal and the assignment of errors alleged the unconstitutionality and the inapplicability of the said Michigan "Civil Rights" Act as to defendant in its aforesaid business under both the commerce clause and the 14th Amendment to the Constitution of the United States (M. S. C. 54, 63). The said claims and contentions of the defendant as to the unconstitutionality of the said "Civil Rights" statute were overruled by the Supreme Court of

Michigan. The trial court filed a written opinion upon the matters involved as did the Supreme Court of the State of Michigan, both of which opinions are appended hereto.

VII:

The opinion of the Supreme Court of Michigan (that being the highest court of that state) upon the matters herein involved was handed down on April 17, 1947, and judgment entered the same day. Thereafter, in timely and in due season and in accordance with the rules and practice of the Supreme Court of Michigan defendant filed an application for rehearing, which application was denied by the Supreme Court of Michigan on June 12, 1947. Such date therefore (June 12, 1947) is the date of the final judgment sought to be reviewed. Under decisions of the Supreme Court of the United States time for an appeal to that Court begins to run from the date of the denial of such application for rehearing. *Department of Banking* v. *Pink*, 317 U. S. 264; *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498. See also U. S. Code Annotated, Title 28, Section 350.

VIII.

The date upon which application for appeal herein is presented, is August 18, 1947.

Respectfully submitted,

Richard E. Cross,
4200 Penobscot Building,
Detroit 26, Michigan.

Wilson W. Mills,
1712 Ford Building,
Detroit 26, Michigan,
Attorneys for Defendant and Appellant.

APPENDIX "A"

STATE OF MICHIGAN SUPREME COURT

83 January Term, 1947. Filed Apr. 17, 1947

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff and Appellee,

v.

BOB-LO EXCURSION COMPANY, a Michigan Corporation, Defendant and Appellant

Before the Entire Bench

NORTH, *J.*:

The Bob-Lo Excursion Company, a Michigan corporation, having waived trial by jury was tried in the recorder's court of Detroit and found guilty of having violated the so-called civil rights statute of Michigan (Act No. 117, Pub. Acts 1937; Stat. Ann. 1946 Cum. Supp. Sec. 28.343). From its conviction defendant has appealed.

Defendant admits that in June 1945 its agents compelled a negro girl, the complaining witness herein, to disembark from one of its ships at the wharf in Detroit and denied her accommodations on its ship solely because she was a colored person. She was tendered repayment of the purchase price of her ticket. For its discriminatory action in refusing passage to the negro girl defendant was prosecuted and convicted under the cited act. The pertinent portion of the statute reads:

"Sec. 146. All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of * * * public conveyances on land and water * * * and all other places of public accommodation, amusement, and recreation, where refreshments are or may hereafter be served, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices."

Among the various purposes for which defendant was incorporated are: "To lease, own and operate amusement parks in Canada, and to charter, lease, own and operate excursion steamers and ferry boats in interstate and foreign commerce, together with dock and terminal facilities pertaining thereto." Decision herein presents the question as to whether defendant is engaged in foreign commerce. Defendant asserts that it is so engaged and in consequence thereof defendant claims that the quoted statute is not applicable and that defendant's conviction thereunder was unlawful.

In 1945 defendant's business was chiefly devoted to transportation of passengers to and from Bob-Lo Island (also known as Bois Blanc) and the operation of facilities for recreation and amusement owned by it on Bob-Lo Island. Except for four lots this Island is owned by defendant. It is a part of the Province of Ontario, Dominion of Canada. Only defendant's ships have access to Bob-Lo Island. Ordinarily these ships make round trips between Detroit and the Island, but occasionally they also make round trips between Windsor, Ontario, and Bob-Lo Island. But defendant does not transport passengers from Canada to Michigan. In traveling between Detroit and the Island defendant's ships cross the international boundary line several times and are in Canadian waters for about a half of the voyage. Defendant's ships are required by federal law to be enrolled by the United States Customs Service, and the enrollment license must be renewed annually. Defendant's commerce activities and ships are subject to regulations and inspection by the United States Treasury, the United States Immigration Service, the United States Navy Department and the United States Army Engineers. Its ships are also regulated by similar governmental agencies of the Dominion of Canada.

In the case of Gibbons *v.* Ogden, 9 Wheaton 1, 190 and 195, Chief Justice Marshall speaking for the Supreme Court of the United States, said:

"All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation. • • •

"But in regulating commerce with foreign nations, the

power of congress does not stop at the jurisdictional lines of the several states It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States."

In the case of Lord *v.* Steamship Co., 102 U. S. 541, the Supreme Court said:

"The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State. It is conceded that while the Ventura carried goods from place to place in California, her voyages were always ocean voyages."

The question was resolved as follows:

"Commerce includes intercourse, navigation, and not traffic alone. • • •

"The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore the Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was

engaged were subject to the regulating power of Congress."

In view of the holdings in Gibbons *v.* Ogden, and Lord *v.* Steamship Co., supra, and of like holdings in many other cases which might be cited, it must be held in the instant case that the defendant is engaged in foreign commerce. And in the light of that determination decision must be made as to whether the so-called civil rights statute of Michigan, above cited, is valid or at least whether it is applicable to defendant under the facts and circumstances of the instant case. And in turn decision of that issue hinges on whether the cited Michigan civil rights statute imposes an unreasonable burden on foreign commerce. Since by the Federal Constitution the power to regulate both foreign and interstate commerce is vested in Congress,* due consideration must be given to pertinent decisions of the Supreme Court of the United States. We have so held as to interstate commerce, and that holding is equally applicable to foreign commerce.

"The power given congress by the United States Constitution to regulate commerce among the several States is exclusive, and the decisions of the United States Supreme Court upon that question are controlling." (Syllabus) People *v.* White, 197 Mich. 283.

Many cases hold that state legislation which unduly burdens interstate or foreign commerce is invalid, even where Congress has not acted. Such is the holding in the very recent decision of the United States Supreme Court in Morgan *v.* Commonwealth of Virginia, — U. S. —, 66 S. Ct. Rep. 1050. As stated in the headnotes in that case, the court held:

"State legislation or a final court order materially affecting interstate commerce is invalid, even where Congress has not acted.

---

* U. S. Const., Art. I, Sec. 8.

"The Congress shall have Power * * *

(3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

"Where Congress has not acted, a state may validly enact legislation affecting interstate commerce, where the legislation has predominantly only a local influence on the course of interstate commerce.

"State legislation is invalid if it unduly burdens interstate commerce in matters where uniformity is necessary in the constitutional sense of useful in accomplish a permitted purpose.

"Because the Constitution puts the ultimate power to regulate interstate commerce in Congress, rather than in the states, the degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the state statute unconstitutional."

We have given careful consideration to the various decisions upon which defendant relies, particularly Hall *v.* DeCuir, 95 U. S. 485; Pryce *v.* Swedish-American Lines, 30 Fed. Supp. 371; Henderson *v.* New York, 92 U. S. 259; and Board of Trustees *v.* United States, 289 U. S. 48. However, we are of the opinion that each of the above cases either by reason of the factual background of the legal issue involved must be distinguished from the instant case. In the Hall-DeCuir case, the court based decision upon the assumption that by reason of traversing the waters of various states and stopping at ports in such states the carrier might meet with statutory requirements of various types, and with which the Louisiana statute might be in conflict and compliance with both would be quite impossible. Under such circumstances the court held invalid the Louisiana statute which required "those engaged in inter-state commerce to give all persons travelling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color." Obviously the carrier in the instant case is not in its business confronted with the circumstances which led the court in the Hall-DeCuir case to hold that the Louisiana statute imposed an undue burden upon interstate commerce. In the instant case it quite conclusively appears that defendant in carrying on its commerce or transportation will not

be subjected to an undue burden arising from conflicting regulations by being required to render its services alike to both white and colored persons.

Pryce *v.* Swedish-American Lines, *supra*, is not a decision of a court of last resort and the court seems to have rather summarily based its decision, so far as its application to the instant case is concerned, upon the holding in Hall *v.* DeCuir, just above considered. Decisions in Henderson *v.* New York, *Supra*, and Board of Trustees *v.* United States, *supra*, are not particularly applicable to the instant case. Neither involved discrimination based on race or color. In effect the Henderson decision was merely that a state is without power to impose unreasonable requirements or a tax upon foreign commerce. And the holding in Board of Trustees *v.* United States was merely to the effect that "States and their instrumentalities" are not "relieved of the duties on articles imported by them" in foreign commerce.

The decisions cited by defendant are not controlling of the instant case unless it appears that the Michigan civil rights act imposes an undue burden on the foreign commerce in which defendant is engaged. That issue is material to decision — the instant case. But we are of the opinion that holding the provisions of the Michigan statute effective and applicable in the instant case results only in this, defendant will be required in operating its ships as "public conveyances" to accept as passengers persons of the negro race indiscriminately with others. Our review of this record does not disclose that such a requirement will impose any undue burden on defendant in its business in foreign commerce. As applied to the facts in the instant case the Michigan civil rights statute is neither in derogation of or in conflict with pertinent federal regulations. Instead the mandate of the Michigan statute is in accord with the federal civil rights act, which contains the following:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings

for the security of persons and property as is enjoyed by white citizens * * *." R. S. Sec. 1977; U. S. C. A., Title i, Sec. 41.

While literally the provision of the interstate commerce act about to be noted applies to common carriers, nonetheless it is indicative of the character of federal regulations in this field of the law. The interstate commerce act prohibits common carriers from subjecting any person "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." See paragraph 1, sec. 3 of the interstate commerce act, U. S. C. A., Title 49. Referring to the above provision the United States Supreme Court has said:

"Paragraph 1 of sec. 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act 'to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' 49 U. S. C. 3. From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race and the duty of carriers to provide equality of treatment with respect to transportation facilities; that is, that colored persons who buy first-class tickets must be furnished with accommodations equal in comforts and conveniences to those afforded to first-class white passengers." Mitchell *v.* United States, 313 U. S. 80, 95.

There is no escape from the conclusion that defendant herein is engaged in the business of operating "public conveyances" by water, and the Michigan statute provides: "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations" afforded by such conveyances. The Michigan enactment has been held constitutional. Holden *v.* Operating Corporation, 239 Mich. 316. Our conclusion is not only that the Michigan civil rights act is constitutional but that it is applicable to the business carried on by defendant; and further that it does not impose an undue burden on defendant's commerce activities.

In arriving at the above conclusion we are mindful of our decision in Meisner *v.* Detroit, Belle Isle & Windsor Ferry Co., 154 Mich. 545, wherein the present defendant's corporate predecessor was defendant. It was there held that the defendant engaged in the same business activities as defendant in the instant case, "is not, as to the enterprise named, a common carrier, and it may refuse to carry to such park anyone at its pleasure." But the holding in the cited case is not controlling in the instant case because the former decision turned solely on the holding that the defendant therein was not a common carrier. The report of the Meisner decision states: "The action is in tort, alleging a breach of defendant's duty *as a common carrier* of passengers." It does not appear in the Meisner case that plaintiff asserted a right under the Michigan civil rights statute; whereas in the case at bar that statute is of controlling importance. In the instant case decision is not controlled by defendant's being or not being a common carrier. Whatever its classification in that respect may be, it unequivocally appears from the record that it operates "public conveyances on * * * water" and that such operations have their inception in this State, wherein the statute provides all persons within the jurisdiction of the State shall be entitled to full and equal accommodations of such public conveyances. It is not amiss to note that one may be engaged in interstate or foreign commerce notwithstanding he is not a common carrier. An example of such a status is found in the operators of trucks who are contract carriers. But such carriers upon crossing State lines become engaged in interstate commerce, and upon crossing National lines become engaged in foreign commerce. Nonetheless they are not common carriers. Michigan Public Utilities Commission *v.* Duke, 266 U. S. 570.

The law of interstate commerce, but applicable alike to foreign commerce, in the light of which the instant case must be decided, with numerous supporting citations, is stated in 15 C. J. S. 268, as follows:

"However, the constitutional grant to congress of power to regulate interstate commerce, although operating of its own force to curtail state power in some measure, does not

forestall all state action affecting interstate commerce; it does not withdraw from the states power to legislate in respect of their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce. Although state legislation affects interstate commerce incidentally, indirectly, or remotely, yet where it does not undertake to regulate such commerce and is no more than a bona fide, legitimate, and reasonable exercise of the reserved police power of the state in respect of matter of local or internal concern, it is valid and * * * will stand, in the absence of conflicting and superseding legislation by congress in the exercise of its superior authority to regulate commerce among the states."

The decision of the lower court is affirmed.

APPENDIX "B"

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

File No. 27124

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff,

vs.

BOB-LO EXCURSION COMPANY, Defendant

DECISION ON MOTION AND VERDICT

Only one witness for each side testified at the trial, the complainant for the People and Mr. Devereaux for the defense. The Complainant, Miss Sarah Ray, testified she was a negress and that on June 21, 1945 she was refused passage and other facilities and accommodations on the Bob-Lo Boat by the defendant company, although her fellow employees and companions—all of whom were of the Caucasian race were granted passage, privileges and accommodations on said boat by said Bob-Lo Excursion Company. Mr. Devereaux, an employee of said defendant com-

pany, agreed with complainant's testimony and also answered some questions from his own personal knowledge and some from exhibits—which were introduced—relative to the type of business or commerce of the defendant company, plus data on inspections, immigration, rates, etc.

On cross-examination of Mr. Devereaux, it was shown that the Bob-Lo Excursion Company ran "ads" in the public press for business or rather passenger trade and that the tickets sold were what might be called "Round Trip Tickets." In short, the testimony was very brief, as counsel for each side more or less agreed to the facts in the case.

At the end of the People's case and again at the conclusion of trial, the defendant, through its counsel, moved for a directed verdict of not guilty. Oral arguments were made and briefs filed and the matter stood adjourned until today for the Court's decision and verdict.

In treating and considering this matter in its entirety, the Court has divided the same into six (6) divisions:

1. Statement of Facts
2. Statement of General Rules
3. Analysis of Cases in Defendant's 1st Brief
4. Analysis of Cases in Defendant's 2nd Brief
5. Questions involved—Answers—Authorities
6. Decision on Motion and Verdict.

General Rules

Congress has exclusive plenary power under the Constitution to regulate our state and foreign commerce. However, the states still have police power within their borders to pass legislation, even although it may incidentally regulate, for state purposes only, their citizens, including also those citizens who accommodate the public for hire within state jurisdiction.

The navigable waters adjoining the state are within state jurisdiction and defendant is a Michigan corporation, and therefore, a Michigan citizen.

Defendant operates a public conveyance on water, since it operates a steamer, advertises pleasure cruises and fixes the price to the public. It is not a common carrier. It

does not have *that* special relationship with the state; nor the special privileges of the common carrier.

Since defendant is a Michigan citizen operating to and from Michigan, it may not discriminate on the grounds of race or color when carrying passengers for hire to and from Detroit. If it does discriminate on either grounds in Detroit, it violates the Civil Rights Act. This defendant is charged with a violation of that act in Detroit.

Defendant claims, of course, that because it operates a pleasure park on an island owned by it, located in Canadian waters, and because to reach that island it must go partly through Canadian waters, that it is engaged in foreign commerce. The evidence does not show that the island is inhabited except, perhaps, by some of defendant's employees engaged in the operation of the amusement park. That park is operated entirely for defendant's benefit for profit. The steamer on which complainant was refused passage operates from defendant's wharf in Detroit through the Detroit River into Lake Erie and stops at Bob-Lo Island in Canadian waters. It stops nowhere else and it returns to Detroit. No one-way tickets are sold. Freight is not carried except such as may be used by defendants in operating their amusement park. It makes no other stops in Canada. Its advertisements hold it out as offering pleasure cruises, as well as the amusement to be had on Bob-Lo and not all passengers alight at Bob-Lo.

According to the brief, defendant has both United States and Federal Maritime licenses. It is subject to the regulation of the United States as regards the food and drinks served by it on the island. Apparently, there is no Canadian inspection. It reports to the United States Customs and Immigration Departments, as well as to the Canadian. It is subject to the United States regulation as regards its equipment on the steamer. Apparently, the Canadian regulations have to do merely with preventing uninspected importation or immigration for which this defendant has no license.

As a carrier of passengers, defendant is subject to direct regulation by Congress whether under the Interstate Commerce Commission, the Maritime Commission, The Federal Shipping Act, or similar Federal regulation.

The Interstate Commerce Act, while directed to the business of common carriers only, expressly insists upon prohibition of discriminations of any type. That prohibition is broad enough to forbid discrimination on the grounds of color, as the Mitchell case cited by defendant affirmatively shows. By its terms, the Interstate Commerce Act includes commerce with an adjacent foreign nation originating in the United States.

Of course, Congress has no regulatory power over foreign commerce, except by treaty, or except such as originates in the United States or ends there or both. If it does originate and end within the United States, Congress' power is clear, even although part of the trip may be through foreign territory or over foreign waters. A state has no jurisdiction beyond its borders. Michigan's jurisdiction includes the navigable waters adjoining Michigan to the center line. Of course, Michigan does have jurisdiction over offenses committed in Detroit.

Conveyance by water which starts from Detroit, goes through American and Canadian waters to an island in Canadian waters, owned and operated by defendant, said conveyance carrying passengers who buy only round trip tickets in Detroit to go and return and carries no other passengers, even though it allows temporary disembarkment at the passenger's election on the island in Canadian waters, is not, I think, engaged in foreign commerce.

Transportation is commerce, but transportation to and from Detroit with the temporary stop-over is not, the Court thinks, foreign commerce. If the amusement is commerce, it is not foreign commerce even though on foreign soil, unless it includes some type of inter-course or exchange with a foreign nation. This inter-course or exchange on Bob-Lo is controlled by American citizens and involves no foreign inter-course.

Moreover, the Civil Rights Statute of Michigan is not an attempt by our state to regulate directly either Interstate or Foreign Commerce, even though it may incidentally affect some Michigan citizens who engage in such commerce. It follows that even if we assume that defendant's business is, as it claims, foreign commerce, it is still subject to state

regulation under the state police power for acts committed in the state. If the statute does affect such citizens' commerce incidentally, it still does not contravene the plenary right of Congress to regulate.

The rule is well settled that if Congress does regulate in a given field of commerce, the state's police power may not regulate in the same field. The commerce clause was intended to give Congress exclusive power in fields where a single authority is indicated. However, where Congress does not or has not regulated, the state may regulate within its own jurisdiction even though the regulation directly affects commerce, unless there has been some Congressional indication that in that particular field of commerce Congress desired commerce to be wholly untrammeled.

That situation, of course, does not here exist. Every regulation of commerce controlling either Interstate or Foreign Commerce and emanating from the Congress has been declaratory against discrimination. Clearly, therefore, it must be inferred that Congress does not desire *any* type of commerce to indulge in race discrimination.

It is true that a state exercises of police power whether aimed directly at commerce or not, will not be held valid if it imposes an additional and unreasonable burden on either Interstate or Foreign Commerce. Assuming, though not admitting that defendant is engaged in commerce at all, other than transportation, still the statute imposes no burden upon defendant. The Civil Rights Statute forbids discrimination but it makes no mandatory provision. If the defendant should desire to outfit its steamer with separate equal accommodations for whites and colored and it is engaged in foreign commerce, such an outfitting would, under the decisions, be valid as far as Federal supervision is concerned. However, our statute does not burden defendant with the requirement that it must so segregate. It merely lays down the rule that defendant may not discriminate against citizens of Michigan or residents of Michigan, either on the score of race or color.

An analysis of all decisions cited by defendant reveals no support for defendant's contention that the Michigan Statute contravenes Congressional power over foreign com-

merce. The only case which appears to so hold is Pryce *v.* Swedish-American Lines, 30 Fed. Supp. 371. However, that case is:

1. Not a decision by an Appellate Court.
2. Is based squarely upon the decision of Hall *v.* DeCuir, 95 U. S. 485, where the La. Statute was held as constitutional.

because,

a. Expressly said by the La. Supreme Court to operate interstate.

b. Was expressly found by the U. S. Supreme Court to burden commerce.

Our Civil Rights Statute claims no extra territorial jurisdiction and asks to impose no burden.

Analysis of Defendant's Citations

Cases in First Brief:

It should be noted that throughout the brief defendant uses, interchangeably, the terms "public conveyance" and "common carrier." They are not the same. This defendant is a public conveyance and a carrier but not a common carrier.

1. Public Utilities *v.* Duke, 266 U. S. 577.

This was a case where the United States Supreme Court held a Michigan statute to be unconstitutional because: First, it was a direct regulation of interstate commerce. Second, it imposed a direct burden by forcing upon all carriers, who used Michigan highways, the liabilities of common carriers.

Defendant Duke was a citizen of Ohio, who operated freight trucks and had three contracts to carry furniture from Ohio to Michigan. The act declared unconstitutional would have compelled him to live up to the duties of a common carrier, although he did not have the special privileges of such a carrier, such as eminent domain. The Supreme Court said that a private carrier could not be made a common carrier by legislative fiat.

2. Meisner *v.* Ferry Company, 154 Michigan 545.

In that case, the defendant was the predecessor of the defendant in the instant case. It was sued for discrimination in refusing to carry plaintiff. This was not a discrimination for race or color and, therefore, the earlier version of the Civil Rights statute, then in effect, could not have been invoked. The theory of the suit was that as defendant was a carrier, it could not pick and choose passengers in the absence of misconduct. This was the law of common carriers at common law. However, the Supreme Court held that defendant was not a common carrier, it did not have the special privileges of a common carrier and could select the passengers it chose to carry. The decision pointed out that defendant was as much a private business as a theatre or a race course. This is significant because the Civil Rights Statute penalizes discrimination on the part of theatres and race courses, as well as conveyances, if the discrimination is based on race or color.

In the Meisner case, there was not discussion of whether or not the defendant was a public conveyance. The only distinction drawn was between common carrier and a private carrier. Many private carriers are public conveyances if they hold themselves out to the public for hire.

That decision throws no light whatsoever on the question in the instant case.

Defendant cites cases to prove that criminal statutes must be strictly construed and also that state courts are bound by the decision of the United States Court on Federal constitutional questions. Those cases will not be discussed, since those *principles* are conceded.

3. Hall *vs.* DeCuir, 95 U. S. 485.

This was an appeal from a decision of the La. Supreme Court, affirming a judgment for damages in favor of Mrs. DeCuir, a colored woman who had taken passage on defendant's steamer plying the Mississippi River between points in Louisiana and in adjoining states also. She was refused entry to the cabin reserved for white persons, although she was offered accommodations in the negro section, which

she refused. The Louisiana statute prohibited carriers from discriminating on the score of race or color. It was a direct regulation of commerce, therefore, and the La. Supreme Court in its decision stated that the statute was broad enough to apply to interstate commerce. Mrs. DeCuir had recovered damages and the owners of the steamer appealed.

The United States Supreme Court said that they must accept the holding of the Louisiana Supreme Court; that the statute was intended to have interstate effect. This, they said, was to contravene the power of Congress to regulate commerce interstate. They also pointed out that this regulation, besides being interstate, would impose a burden upon commerce because two of the adjoining states had statutes which required carriers to segregate whites and colored. They said that the steamer might have to have accommodations for whites and colored elsewhere if it passed through the waters of the Mississippi, for example, and when the steamer reached Louisiana, it would be compelled to change the system and mingle the two; and then, perhaps, at the next stop, segregate them again in another state, which would be burdensome.

On the score, then, that it was a direct and deliberate regulation of interstate commerce and that it imposed a burden upon commerce, they held the statute unconstitutional.

The distinction between that case and the instant case is clear. Our Civil Rights Statute is not a direct regulation of commerce. It is only incidental. Moreover, our Court does not claim that the statute has extra territorial effect or applies to interstate commerce directly.

The DeCuir decision reflects the earlier Federal decisions which attempted to meet the southern problem arising under the 14th Amendment. Technically, the decision is correct, but inapplicable here.

4. Mitchell *vs.* United States, 313 U. S. 80.

Mitchell, a colored Congressman, took passage from an interstate journey starting in Illinois and including among other states, Arkansas. He paid a first class passage but

at the Arkansas border, he was compelled to transfer to a second class cabin, because Arkansas had a law requiring carriers in the state to segregate white and colored. He was offered a refund on his ticket, which he refused. He made complaint to the Interstate Commerce Commission that the railroad was discriminating. The Commission held a hearing at which it was shown that very few colored persons demanded first class passage. It was also shown by the testimony that the first and second carriages differed. Actually, second class accommodations were greatly inferior in a number of respects. The Commission ruled that in view of the circumstances, the discrimination was not unreasonable. Mitchell appealed to the United States Supreme Court which reversed the Commission's finding, holding that the discrimination forbidden in the Interstate Commerce Commission Act included color discrimination. That such discrimination was unreasonable. That while Arkansas had a right to demand segregation, that did not relieve the railroad from the duty to avoid discrimination by offering equal accommodations to persons of both colors.

The statute was not, as defendant's brief alleges, held void. It was conceded that the state had the power to make such a statute, but that it could not affect interstate commerce so as to negative the Interstate Commerce Act which prohibited discrimination.

In the case at bar, if defendant is really engaged in foreign commerce, as it claims, and if the same rule applies under the Act, which it probably does, then consistently with the Mitchell decision, this Court should find that the Civil Rights Act is valid as affecting such commerce, but that it cannot affect it so as to require the carrier to refuse the passenger equal accommodations. In other words, Congress has forbidden common carriers to refuse equal accommodations in interstate commerce or in a commerce to the United States to a foreign or adjacent country, or from such a country to the United States. The Supreme Court has ruled that they may segregate in the states which so require so long as accommodations are equal. This, of course, does not license carriers to refuse *all* accommodations. Insofar as it is applicable at all, the Mitchell decision refutes defendant's contention, since under it Congress has

gone on record as demanding equality of accommodation and as branding denial, thereof, as discriminatory, both in state or interstate commerce.

Since, however, the Interstate Commerce Act attempts regulation only of common carriers, the case is applicable only by analogy. However, it also shows affirmatively that Congress does not desire all commerce under its control to be so untrammeled that it may indulge in racial discrimination.

It is unfortunate that since defendant is not a common carrier, this complainant cannot have recourse to the same procedure adopted by Mitchell under the Interstate Commerce Act. She cannot, however, because that Act expressly applies only to common carriers.

In passing, the Court remarks that statutes, such as Arkansas and some other states, mostly southern, have passed, would be held unconstitutional in Michigan as Michigan decisions hereinafter discussed affirmatively show.

5. Edwards *vs.* California, 314 U. S. 116.

This involves a California statute which attempted to discriminate against indigent persons seeking to enter the state and made it a penal offense to assist in such entry. Defendant Edwards brought his brother-in-law from Texas into California by car. The evidence showed that the brother-in-law was indigent within the meaning of the California statute and Edwards was found guilty. He appealed and his conviction was reversed by the United States Supreme Court on the score that the California Act was an unconstitutional barrier to commerce and, therefore, not a valid exercise of the state police power. The Supreme Court in its discussion expressly recognized that a state statute exercising police power in a matter of local concern is valid, even though it may thereby affect interstate commerce (Syll. 2).

Justice Byrnes wrote the opinion. Justices Douglas, Black and Murphy, while concurring in the result, preferred to place the decision on the grounds that the statute violated the 14th Amendment and declined to find it a violation of the commerce clause. Justice Jackson, in a third concur-

ring opinion, expressly repudiated the commerce clause reason.

The California regulation was expressly aimed at interstate transportation. It had no other purpose. It also expressly denied the rights of national citizenship. Under either viewpoint, the decision was correct but offers no support to defendant's position in the instant case. In our case, the Statute only incidentally touches upon commerce outside the state and it does not deny to any citizen the equal protection of the laws.

6. *Pryce* vs. *Swedish-American Lines*, 30 Federal Supplement 371.

This was decided in 1930 but never carried to any Appellate Court, so that it is in no sense authority.

Mrs. Pryce, a colored American citizen of New York, bought a ticket to South America on defendant's line and was later refused accommodation expressly because she was colored. She made a complaint in New York under the state's Civil Rights statute, which is quite similar to our own. It was transferred to a lower Federal Court, apparently, a Maritime Court, presumably because of diversity of citizenship. Without any discussion, the Court declared the statute could not apply to defendant, expressly resting its decision on the case of *Hall* vs. *DeCuir, Supra.*

Since the New York state Supreme Court had not claimed extra territorial effect for its statute and since it was not shown that it had imposed an additional burden upon the defendant to accept Mrs. Pryce, the Hall-DeCuir decision was not authority in such a decision for the Pryce decision. No other reason was given. In this Court's opinion, an appeal to the United States Supreme Court, or even to the Circuit Court of Appeals, would have resulted in reversal. In any case, the decision of such a court is in no sense binding. If it were, then a common carrier operating from a point in the United States to a foreign or adjacent country, the defendant would have been under the supervision of the Interstate Commerce Commission and would have been held guilty of unreasonable discrimination, as was the defendant in the Mitchell case.

Defendant, in his brief on page four, contends that the effect of these citations is to prove that Congress only has power to regulate foreign and interstate commerce and that its failure to act is equivalent to a declaration by Congress that commerce in that field shall be unregulated. However, that is not the effect of these citations. It is true that Congress under the Constitution is given power to regulate interstate and foreign commerce. It is further true, as the decisions point out, that if Congress fails to regulate in any particulars field, there are two possible results:

1. Its failure may be held to indicate a desire by Congress that in such a field, commerce is to be unhampered or it may indicate that Congress in that field desires to leave regulation to the states under their police power.

In a situation where Congress, in every recorded regulation of commerce so far as it has regulated, has forbidden the very thing that Michigan statute forbids, namely, racial and color discrimination, but where Congress has applied its ruling only to common carriers, it cannot logically be argued that Congress desires other types of commerce to be free to so discriminate. Inferentially, at least, Congress has left to the state police power to regulate against discrimination in commerce.

The difficulty, of course, with decisions is that they do not necessarily each arise in the same way and no one considers all the points which may be raised in another, wherein circumstances are similar. In citing decisions, therefore, it is safest to first analyze them from both viewpoints.

For example, Hall *v.* DeCuir would say that Louisiana had gone beyond its police power in attempting to directly regulate commerce. They said so because the Louisiana Court had said so and had said that the Act had extra territorial effect. However, in our Michigan case, there is no such direct regulation of commerce and no claim that the Act regulates interstate commerce either.

2. The Duke case again decides only that a state statute may not so regulate carriers using Michigan highways as to make them assume the burden of being common carriers when they are not.

The Mitchell case simply shows that Congress, by regulation, forbids discrimination and that that regulation requires carriers, subject to the Act, to furnish equal accommodations. As a result, if the carrier, as that one did, passes through a state where the state law requires segregation by color, the carrier must segregate but must still offer equal accommodations. That case does not decide whether or not the Arkansas statute is unconstitutional.

The Meisner case, on which the defendant relies so heavily, has no reference to commerce at all, while the Edwards case is a state attempt to directly prohibit one type of interstate commerce.

Defendant cites further cases where state statutes enacted under the police power were held to be unconstitutional as attempts to regulate interstate commerce. All those applicable were direct regulations of interstate commerce; none cited were statutes forbidding discrimination under penalty within a state, of carriers who might also operate beyond the state lines.

7. Defendant cites Gloucester Ferry Company *v.* Pennsylvania, 114 U. S. 96.

This proves that transportation is commerce, which is admitted and that it requests uniformity of regulation, which, second statement, is only partly true. In that case, defendant operated a ferry, carrying freight and passengers from a point in New Jersey to Pennsylvania and vice versa. It was a New Jersey Corporation and operated on the Delaware River between the two states, owned a dock in New Jersey and leased one in Philadelphia. It owned no property in Philadelphia except the lease and its ships stopped there only long enough to discharge and take on passengers and freight.

Pennsylvania attempted to tax the entire corporate stock of defendant, holding that it was doing business in Pennsylvania, but the United States Court held that its business was in interstate commerce and so not taxable by the state where it held no property, except that the lease could be taxed.

"Commerce among the states" the Court said, "consists of intercourse and traffic between *their citizens* and includes the transportation of persons and property and the naviga-

tion of public waters for that purpose, as well as the purchase, sale and exchange of commodities." * * * "Congress alone, therefore, can deal with such transportation; its nonaction is a declaration that it shall remain free from burdens imposed by state regulation. Otherwise, *there would be no* protection against conflicting regulations of different states, each legislating in favor of its own citizens and products and against those of other states." Clearly, then, the basis of that decision and of the decisions which hold state statutes to be burdensome was the danger of conflicting regulations, if any but Congress could legislate, a danger arising when each state tried to favor its own. Clearly, the type of police regulation in the case at bar does not fall within that purview, since there is no danger to be apprehended from conflicting jurisdictions. Canada can regulate defendant only to prevent violations of the customs or the immigration laws. It cannot require segregation nor compel defendant to refuse passengers because of color. The decision in the Gloucester Ferry case, then, does not go so far as to prevent a state from exercising its police power in its own territory, to prevent color discrimination, even although the defendant is engaged in foreign commerce and intends when it leaves Michigan to go in foreign waters.

It should be pointed out, too, that in the Gloucester Ferry case, passengers were landed on both sides of the river and embarked from both sides and freight came from both sides so that it was truly interstate. This defendant, however, carries only passengers from Detroit and the same passengers back to Detroit, and it does not land in any Canadian port as part of the trip. It is not, we think, commerce at all, or if it is, it is not foreign commerce.

8. Railway *v.* Covington, 235 U. S. 537.

This was held to be a direct regulation of interstate commerce, and was also held to be unreasonable and burdensome. The regulation was a statute of Kentucky regulating the operation of straight course which ran over a bridge from Covington, Kentucky, to Cincinnati, Ohio, which bridge had been held in a prior decision to be an instrument of interstate commerce. Single fares were collected, some to start in Kentucky and others to start in Ohio. In decid-

ing that it was interstate commerce, the Court pointed out expressly that the test of interstate or state (character), is to be derived from what is actually done and from inquiring whether transportation is really and in fact between the states. This case is important as emphasizing the differences between state and interstate transportation. They based the interstate decision on the fact of one-way fares. Defendant's fares are all two-way, originating and ending in Michigan.

9. South Carolina, *v.* Branwall Brothers, 303 U. S. 177.

Cited by defendant, this decision perfectly supports the validity of the Michigan Civil Rights Act and definitely denies the correctness of the defendant's position.

A United States District Court, at the request of Branwall Brothers, which was an interstate trucking company, had enjoined the State of South Carolina from enforcing a state statute, which prohibited the use, on state highways, of motor trucks weighing more than twenty thousand pounds. This applied to all trucks, including interstate trucks. However, the United States Supreme Court reversed the District Court hold—that the statute was reasonable and not a violation of the commerce clause.

The District Court had said that it was burdensome on traffic which would normally go through South Carolina and, therefore, was an unreasonable regulation of commerce interstate. The Supreme Court answered that Congress had not undertaken to regulate said interstate traffic; that the object of the regulation was to improve intra-state commissions and was not *discriminatory* against other states; that it has always been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress.

So, Michigan, as well as South Carolina, has a right to regulate its places of public accommodation, even though this results, incidentally, in the regulation of defendant, who claims to be engaged partially in foreign commerce. Here is no attempt to discriminate between citizens and non-citizens, because defendant is a Michigan citizen. This is

merely a state regulation on a local matter. On this point, because of their number and diversity, Congress has not tried to regulate all carriers—only common carriers—by regulating common carriers against color discrimination. However, Congress has indicated that it does not consider such regulation a burden and does not desire to leave the field of foreign commeree free. Clearly, then, our regulation is valid because:

a. It is reasonable.

b. It is not burdensome.

c. It affects outside commerce, if at all, only instantly.

d. It is in accord with the Congressional viewpoint against color discrimination.

10. The Minnesota Rate Case *vs.* 230 U. S. 352.

These cases held affirmatively that "Congressional nonaction on the subject leaves each state free to establish maximum intrastate rates for interstate carriers, which are reasonable, even though these may require readjustment at state boundaries, certainly that decision offers defendant no support.

11. Kansas Gas Company *v.* Kansas, 265 U. S. 298.

Defendant corporation was engaged in piping gas, originating in Oklahoma and in Kansas, in pipes through the State of Kansas to Missouri and in selling to distributors in both Kansas and Missouri. The Kansas Public Utility Commission attempted to fix the rates *to* which defendant could sell. However, the Supreme Court held that the business was purely interstate, but that Kansas could fix the rate for distributors to sell in Kansas, but could not govern an interstate carrier selling in Kansas to distributors. This, they held, would be a direct burden, and purely interstate commerce. The Court can see no benefit to defendant by this decision.

Finally, defendant cites its own case in the Wayne Circuit Court, No. 219803 in Chancery. The Circuit Court is, of course, a Court only of concurrent jurisdiction with the Court and the decision, whatever it was, is in no sense binding.

Defendant's last assertion in his brief that a corporation as a citizen has the same rights as an individual is not disputed, but not here involved, so the Court passes the citations offered by the defendant on this point.

ANALYSIS OF DEFENDANT'S SECOND BRIEF

I. Defendant repeats its reliance upon the Meisner case, which is here inapplicable. Defendant also again insists that because it is not a common carrier it is not a public conveyance. However, it does offer public accommodations for hire and that is the test, not the type of ownership or the type of a corporation.

Defendant also insists that because the statute reads "public conveyance on land and water" and because defendant only operates on water, the statute does not apply. Michigan decisions have repeatedly held that the words "and" and "or" may be either conjunctive or disjunctive and that the test is intent. One such decision is Elliott *v.* Market, 286 Michigan 112, where the Court construing the statute on bulk sales held that "or" should be read "and." There is, of course, the further rule that a statute must not be so interpreted as to become absurd. The wording of this statute goes back to 1866 to a Federal statute from which it was copied. It has been enforced in Michigan since 1875. At that time amphibian planes had not been invented. Our attention has been called to no other type of conveyance, both on land and water.

II. Whether or not defendant is engaged in foreign commerce is, at least, doubtful. However, if it is, it cannot escape every type of state regulation, incidental or even direct, so long as the regulation is reasonable, not burdensome, and does not encroach upon Congressional powers.

The real test of foreign commerce is whether or not there is, in fact, traffic or inter-course with foreign nations. Another test is the location of the termini. Both are in Michigan.

Defendant's business is transportation plus amusement. Whether the passengers stay on board or get off at Bob-Lo, they still make no contacts with citizens of Canada, have no trade with them—the traffic or trade, if amusement, is

traffic—only with defendant. However, assuming that this is foreign commerce, the statute is still applicable. It is in a field not covered by Congress but it is the type of statute which Congress has approved in other cases by disapproving discrimination.

The offense committed by defendant was committed in Michigan and completed there. It is not a continuing offense. The offense consisted of the violation of a reasonable statute. Defendant asks "What in God's World" does the Michigan Civil Rights statute seek? The Court answers "It seeks to see that all of God's children have equal rights in Michigan."

III. Defendant refers to 109 U. S. 3, following:

The so-called Civil Rights cases, wherein the Supreme Court held the first two sections of the 1866 version of the Federal Civil Rights Statute to be unconstitutional. They so held, because they said that the constitution was the only source of Congressional legislative power. All else was reserved to the states. They said that the 14th Amendment did not give Congress power to legislate against discrimination, but merely to protect those against whom the states discriminated. They did say that Congress could legislate on that subject to regulate commerce. Congress has so legislated in the Interstate Commerce Act, but only as to common carriers. For the rest, the legislation job is still that of the states. Michigan performed that job when it passed its Civil Rights Act.

The Court agrees with defendant that dissenting opinions are not controlling, although they sometimes become majority opinions at a later time; as witness, for example, Child Labor Legislation and minimum wages. It is necessary to read each decision in the light of the conditions at the time and it is necessary to be sure on what grounds a decision rests. In citing both the Hall and the Edwards cases, defendant forgot to do just that. However, defendant cannot deny that our Michigan Supreme Court in Bolden *v.* Operating Company, 239 Michigan 318, has held that the Civil Rights Statute is not lack of due process under the Federal 14th Amendment. That case cites Ferguson *v.* Gies, 82 Michigan 358, my reading of which would form an ex-

cellent background to the case at bar. The court adds, also, that the United States Supreme Court has so decided in numerous decisions, among them, Snowden *v.* Hughes, 321 U. S. 1.

QUESTIONS INVOLVED

Question 1. Should a Michigan citizen, who claims to engage partly in foreign commerce, be wholly free from state regulation.

Answer 1. a. Defendant says yes.

b. Plaintiff says no.

c. The Court thinks the answer is no, provided that such regulations are not a direct burden or do not encroach on Congressional regulation. If they are a valid exercise of police power, affecting outside commerce only incidentally, we believe that anyone in Michigan must obey them or suffer the consequences. *South Carolina* v. *Branwall Brothers*, 303 U. S. 177; *Colley* v. *Post Wardens*, 12 How. 299, 13 L. Ed. 996. The type of legislative regulation forbidden most of the states must constitute a direct and substantial interferenee with commerce. *U. S. F. & G.* v. *Ky.*, 231 U. S. 394; *Boston etc. Rule* v. *Ambrey*, 285 U. S. 234; *California* v. *Thompson*, 313 U. S. 109, 113.

Question 2. Is defendant engaged in foreign commerce?

Answer 2. a. Defendant says yes.

b. Plaintiff says no.

The Court's answer is "could be."

Transportation is commerce, but defendant's transportation begins and ends in Michigan though it does go through foreign waters. There is no traffic with foreign nations. Whether or not that is foreign commerce is questionable.

A decision in each case on whether or not it is interstate or foreign commerce depends on the circumstances of the case. In one Federal case, *Covington* v. *Kentucky*, for example, it was decided that a street car running across a bridge between Kentucky and Missouri was engaged in interstate commerce, because one-way tickets were sold at either end. Here, only roundtrip tickets are sold and must be purchased in Michigan.

Also, in *New York Ex. Ral. Cornall* v. *Sohmes, Controller*, 235 U. S. 548, it was held that a tax on the gross earnings of a steamship can be imposed, but the state of New York was not so burdensome as to encroach on Congressional power when the evidence showed that the only interstate commerce in which the Company indulged was daily trips across the Hudson to New Jersey to pick up toy boats. Every steamer picked up a tow in New Jersey but no one landed there. The termini were all in New York.

Question 3. Assuming that defendant *is* engaged in foreign commerce, has Congress regulated such commerce by allowing or forbidding discrimination on the grounds of race or color to all engaged in such commerce?

Answer 3. Not as far as the Court can discover and defendant cities no such regulation.

Congress, by the Federal Motor Carrier Act, the Maritime Shipping Act and the Interstate Commerce Act, has forbidden unreasonable discrimination to common carriers, whether they are engaged in interstate commerce or in commerce between the United States and an adjacent foreign country. It has not regulated other carriers on this subject.

The Court does not think that that can be taken to mean that Congress indicates it wishes all other commerce, except by common carrier, to be free to discriminate. On the contrary, we are certain that it means that Congress is always against discrimination but leaves the more local problems to local authorities, even though, incidentally, the regulations may have extra territorial effect.

Question 4. Is the Civil Rights Regulation reasonable?

Answer 4. a. Plaintiff says yes.

b. Defendant says no.

c. The Court thinks that it is reasonable and is in line with all Michigan decisions since the Civil War, as well as the decisions of the United States Supreme court, including the Mitchell case. It is not out of line with any decision.

Question 5. Is the regulation burdensome?

Answer 5. a. Plaintiff says no.

b. Defendant says yes (I assume).

c. The Court feels that it is not burdensome. It is intended to govern intra-state commerce, incidentally, and is reasonable, even though interstate or foreign is affected. The Supreme Court of the United States in *Louisville Railroad* v. *Mississippi*, 133 U. S. 589, has upheld a state statute regulating carriers in Mississippi and compelling segregation. This was held not to be burdensome. If it is not burdensome to compel a type of discrimination, it is certainly not burdensome to compel a citizen to refrain from that type or any type. Defendant will not have to make any change in equipment or any operation in order to obey the statute. All it will have to do, is to treat all citizens and persons, white or colored, alike. No Canadian treaty could interfere with the rights of American citizens against such discrimination. There is no possibility, then, of conflicting authority, which is the basis for calling some regulations burdensome.

Question 6. Does the Civil Rights Statute encroach upon the power of Congress?

Answer 6. a. Plaintiff says no.

b. Defendant says yes.

c. The Court thinks the answer is no. As far as Congress has acted, it has affirmed the theory of the Michigan statute. It has not acted beyond regulating common carriers, except in the passage of the present Federal Civil Rights Act, which guarantees "to all persons within the United States, the same right * * * to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." In view of that discrimination, it cannot be said that Congress wishes commerce to be free to discriminate. The Court adds that white citizens are permitted to use defendant's steamers.

Decision on Motion and Verdict

The Court concludes that even if defendant *is* engaged in a very attenuated form of foreign commerce, which is no

certain, still the Michigan regulation is valid and applies.

While the defendant engages in no traffic or intercourse with the citizens of foreign nations and while it sells only round-trip tickets from and to Michigan and deals only with passengers taken on there, still, because it traverses Canadian navigable waters, let us assume it does *some* foreign commerce.

Still, the Civil Right Statute applies. That statute does *not directly* regulate commerce, except, as commerce is one form of "public accomodation." It claims no extra territorial effect; though, incidentally, one doing commerce in foreign waters may be affected while in Michigan.

The statute is valid under all decisions. It is a valid exercise of police power. The offense penalized is committed in Michigan. It is not burdensome at all. Defendant would need to make no change, except in policy, to obey it. It regulates one engaged in foreign commerce only incidentally.

It does not encroach on Congressional power over commerce. Congress has only attempted to regulate *common carriers* so as to forbid discrimination.

That leaves the field open to the States to regulate commerce at home against discrimination, even though it may incidentally affect outside commerce.

Congress has indicated its opposition to color discrimination as unreasonable, by common carriers. Certainly that affirmative regulation does not mean that it wishes all the rest of commerce to be free to discriminate unreasonably.

The statute is not a State attempt to favor its own citizens at the expense of other nations and states.

The motion for a directed verdict of not guilty is denied and the defendant (Bob-Lo Excursion Company) is found guilty as charged.

(Signed) JOHN J. MAHER,
Recorder and Judge.

Dated: November 16, 1945.

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 304

[redacted]

Appeal from the Supreme Court of the State of Michigan

[redacted]

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 374

BOB-LO EXCURSION COMPANY,
Defendant and Appellant,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff and Appellee.

Appeal from the Supreme Court of the State of Michigan

BRIEF FOR BOB-LO EXCURSION COMPANY

OPINION BELOW

The opinion of the Supreme Court of Michigan (R. 36) is reported in 317 Michigan 686. There was also a written opinion in the Recorder's Court (that being the trial court and court of first instance) denying defendant's motions for verdict and judgment which is part of the record herein 15-35.

JURISDICTION

The statement of Bob-Lo Excursion Company, appellant, setting forth the basis on which the review of the judgment of the Supreme Court of Michigan is here invoked on appeal has been heretofore filed with this Court in this cause in compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, and probable jurisdiction has been noted by the Court on October 27, 1947 (R. 59).

STATEMENT OF THE CASE

This is a test case and the facts are undisputed. In the summer of 1945, appellant, defendant herein, refused to carry a colored girl, and because she was colored, upon one of its vessels from its dock at Detroit, Michigan, to Bois Blanc Island, locally and hereinafter referred to as Bob-Lo Island, Ontario, Canada (R. 6). It tendered to her in repayment the price of the ticket in accordance with its terms which she refused (R. 4, 5). For its action in refusing her passage defendant was prosecuted, convicted and sentenced under the Michigan "Civil Rights" Act (pages 5-6 hereof). The unconstitutionality of the Michigan statute involved under the commerce clause of the federal Constitution was raised in the trial court by way of motions for verdict of not guilty and of judgment of not guilty (R. 12, 14, 15) upon the same grounds as this appeal, which motions were denied (R. 35). The same questions were again raised upon the appeal to the Supreme Court of Michigan (R. 35). The defendant is organized as a private corporation for profit, to engage in the business of leasing, owning and operating "amusement parks in Canada, and to Charter, lease, own and operate excursion

steamers and ferry boats in interstate and foreign commerce, together with dock and terminal facilities pertaining thereto'' etc., (R. 5) and its principal business consisted, as set forth in the opinion of the Supreme Court of Michigan (R. 37, 38), in the transportation of passengers from Detroit upon the Detroit River "to and from Bob-Lo Island (also known as Bois Blanc) and the operation of facilities for recreation and amusement owned by it on Bob-Lo Island. Except for four lots this Island is owned by defendant. It is a part of the Province of Ontario, Dominion of Canada. Only defendant's ships have access to Bob-Lo Island. Ordinarily these ships make round trips between Detroit and the Island, but occasionally they also make round trips between Windsor, Ontario, and Bob-Lo Island. But defendant does not transport passengers from Canada to Michigan," (except those they have carried there). "In traveling between Detroit and the Island defendant's ships cross the international boundary line several times and are in Canadian waters for about a half of the voyage. Defendant's ships are required by federal law to be enrolled by the United States Customs Service, and the enrollment license must be renewed annually. Defendant's commerce activities and ships are subject to regulations and inspection by the United States Treasury, the United States Immigration Service, the United States Navy Department and the United States Army Engineers. Its ships are also regulated by similar governmental agencies of the Dominion of Canada." Defendant only uses its own property and does not use any public property in Detroit or Bob-Lo Island (R. 6, 11, 12). It caters largely to women, children and churches (R. 6). Its transportation rates are not regulated by any public authority and it makes such rates as it sees fit (R. 7) and they vary as to individuals, days of the week, and discounts offered, and each year it gives

away several thousand passes (R. 7). Defendant's vessels only carry passengers and do not carry mail, freight or express and defendant has no joint or through traffic rate with any railroad, steamship company, motor vehicle company, corporation or partnership (R. 7). At arrival of the vessels at Bob-Lo passengers who land must pass Canadian customs and immigration inspection (R. 8, 9) and upon returning to Detroit, United States customs and immigration examination (R. 8, 9). The vessels are annually inspected by federal steamboat inspectors who issue permits to operate (R. 8, 9) and a somewhat similar license from the Dominion Government is required (R. 9). Defendant is required to make periodic customs reports to the United States Treasury, immigration reports to the Department of Justice, other reports to the United States Navy Department, to the United States Army Engineers, and the Department of National Health and Welfare of the Dominion Government (R. 8, 9). Customs clearances are required both by the United States and Canada (R. 8, 9).

SPECIFICATION OR ERRORS TO BE URGED

The questions here presented to the Court are in reality but one, viz: the Michigan Civil Rights Statute is either unconstitutional as violating the commerce clause of the Federal Constitution, or at least may not constitutionally be applied to defendant when engaged in its foreign commerce business. The two assignments of error (R. 52) providing the above in detail and here urged are as follows:

1. The Supreme Court of the State of Michigan erred in its decision and judgment in holding the Michigan "Civil Rights" Act as amended, (Act 117, P. A. 1937; sec. 17115-146, 7 Mason's 1940 Cumulative Supplement; Stat. Ann. 1946 Cum. Supp. Sec. 28.343,4) was valid and

in holding the same was applicable to defendant when engaged in foreign commerce, on account of the provisions of Art. I, Sec. 8, (3) of the Constitution of the United States, under which the said Michigan "Civil Rights" Act is either unconstitutional or at least may not be constitutionally be applied to defendant when engaged in such foreign commerce, and which decision is hereby assigned as error.

2. The Supreme Court of the State of Michigan erred in its decision and judgment in holding that the aforesaid Michigan "Civil Rights" Act as amended was valid and enforcible as against this defendant when engaged in foreign commerce, in that under Article I, Sec. 8 (3) of the Constitution of the United States, such foreign commerce may not be regulated by the State of Michigan but is solely under the jurisdiction of the Congress of the United States, and the said Supreme Court of Michigan erred in not holding said Act may not constitutionally be applied to defendant when engaged in foreign commerce, or in not holding said act was invalid under said provision of the Constitution of the United States if so applied, and which decision is hereby assigned as error.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution Article I, Sec. 8, (3) reading as follows: "Section 8. The Congress shall have Power * * * (3) To regulate Commerce with foreign Nations, and among the several States." * * *

The Michigan Statute attacked herein as a void or at least inapplicable regulation of foreign commerce as applied to defendant's business is the Michigan Civil Rights Statute and being Mich. Stat. Ann. 1946 Cum. Supp. Sec.

28.343,4 (also known as Sec. 17115-146-7 Michigan Compiled Laws 1940)—

> "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, restaurants, eating houses, barbershops, billiard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, where refreshments are or may hereafter be served, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices."

Section 147 provides for punishment by way of fine or imprisonment or both and then enacts that any person who violates any of its provisions "shall be liable to the injured party, in treble damages sustained, to be recovered in a civil action."

ARGUMENT

SUMMARY

(a) Defendant is engaged in foreign commerce.

(b) The Michigan Civil Rights Statute involved may not constitutionally be applied to defendant when engaged in such foreign commerce on account of the commerce clause of the Federal Constitution.

(c) Comment upon opinion below.

DETAILED ARGUMENT

(a) Defendant is engaged in foreign commerce:

As stated in the foregoing statement of facts defendant's business was the ownership and operation of two steamers plying from Detroit U. S. A. to Bob-Lo Island Canada, and the transportation of passengers thereon. Its passengers from Detroit are transported by defendant on its vessels to Bob-Lo Canada, where they disembark, later returning to Detroit by the same or another of defendant's vessels. On the route to the island the international boundary between the United States and Canada is crossed four or five times and a like number of times on the voyage from Bob-Lo, Canada to Detroit, U. S. A. Approximately half the voyage is in Canadian waters and one-half in American waters (R. 8). Bob-Lo Island is in Canadian waters and a part of the province of Ontario, Dominion of Canada. Defendant's passengers are subject at each termini to both United States and Canadian Customs examination, immigration inspection and the like.

That the above transportation from Detroit U. S. A., to Bob-Lo, Canada, is foreign commerce cannot be doubted, and the Supreme Court of Michigan so held herein (R. 39). Were it not for the strenuous efforts made by coun-

sel below in claiming it was not foreign commerce, counsel for appellant would feel it unnecessary to cite authorities for such a self-evident proposition.

In *Lord v. Goodall S. S. Co.*, 102 U. S. 541, a coastal vessel going without the three mile line was held *merely by that act to be engaged in commerce.* There the craft was plying between two ports both in California and the court stated—

> "She was not trading with them" (other nations) "but she was navigating with them, and consequently with them was engaged in commerce" (544).

In the case at bar defendant's vessels on each voyage not only "navigate with" Canadian and other vessels on the Detroit River but go *outside* the state's boundary (corresponding with the three mile limit in the Lord case) and in addition actually proceed over and upon Canadian waters, and docks and ties up at Bob-Lo a Canadian port in and on Canadian soil, and discharges and takes on passengers thereat. Said the court in the Lord case, *supra,* on page 544—

> "*Commerce includes intercourse, navigation, and not traffic alone*" (emphasis supplied). The vessel when beyond the three mile zone was on "navigation which was necessarily connected with other nations." While there only her national character was recognized, she belonged "to the country whose flag she carried. True she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce." If she committed a wrong, the United States, and not California must answer. "Such nagivation * * *" (affects) "the nation as a nation in its external affairs. It must, therefore, be subject to the national government."

Under the facts in the case at bar this statement is even more true, because defendant's vessels dock at a foreign port and actually traverse foreign waters.

Again, in *Hanley v. Kansas City So. Ry. Co.*, 187 U. S. 617, this Court unqualifiedly held that "*transportation for others as an independent business is commerce*" and "to bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be within the *entire* voyage under the exclusive jurisdiction of the state." (Emphasis supplied.) There a railroad carried goods between two points in Arkansas, part of the route being in Indian Territory (now Oklahoma). The Court held the entire transportation was in interstate commerce, and that Arkansas could not regulate it, pointing out that if that state could regulate it, so could the other state, thus opening the door to *possible* contradictory regulations. For it to be intrastate commerce and part of the state's domestic commerce so the state may regulate it, "*the subject transported must be within the entire voyage under the exclusive jurisdiction of the State,*" quoting with approval from *Pacific Coast Steamship Co. v. Railroad Commr's.*, 9 Sawyer 253, 8.

Further showing that no trading is necessary *the only requisite being transportation over a state line*, is the case of *Edwards v. California*, 314 U. S. 160. There California had passed legislation to protect herself from indigent persons who wished to enter that state to *reside*, and who might well later become public charges. The court found the statute was an unconstitutional effort of the state to regulate interstate commerce, and an "okie" attempting to enter California from another state *to reside*, was held to be in interstate commerce simply because the state line was crossed. No business or trading was involved—only transportation over a state line.

In all the above cases the sole test is "Is there transportation across a state line?" The motives of persons being transported are immaterial. Defendant's business

(and that for which it is oragnized as a private profit corporation) is to transport persons between United States of America and Canada (R. 5).

In *Hall v. DeCuir*, 95 U. S. 485, 489 the court found interstate commerce was involved on a voyage between two points each in Louisiana where the vessel during part of the voyage traversed waters of the Mississippi river lying within that state. As is well known the foundation for this rule was laid down in the celebrated case of *Gibbons v. Ogden*, 9 Wheaton 1.

It is submitted the above cases conclusively demonstrate that defendant, in carrying on its business of transporting passengers from Detroit U. S. A. to Bob-Lo, Canada, crossing the international boundary several times on each voyage and being in Canadian waters and docking and discharging passengers from Detroit at Bob-Lo, Canada, and returning to Detroit and again discharging passengers is engaged in foreign commerce.

(b) The Michigan Civil Rights Statute may not constitutionally be applied to defendant when engaged in the above foreign commerce on account of the provisions of the commerce clause of the federal constitution.

The Michigan act involved is set forth herein on page (6). It is in part a criminal statute (and therefore as to such portion is to be strictly construed in favor of defendant) and provides in effect that "equal accommodations," facilities, etc., shall be furnished by amongst others "public conveyances on land and water," and that no discrimination shall be shown by such conveyance on account of race, creed or color. Penalties for violation are provided. Also treble damages may be recovered in a civil suit by a party aggrieved.

This case has in effect already been decided by this court in *Hall v. DeCuir*, 95 U. S. 485. The facts there were practically identical to those in the case at bar, and the case has uniformly been followed many, many times by this court over the period of some seventy years since its decision. There it appeared that a statute of Louisiana was for all practical purposes identical with the Michigan statute here involved. Said Mr. Chief Justice Waite on page 487 in opening his opinion:

> "For the purposes of this case, we must treat the act of Louisiana, of February 23, 1869, as requiring those engaged in interstate commerce to give to all persons traveling in that State, upon the public conveyances employed in such business, *equal rights and privileges* in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below" which is conclusive on us. (Emphasis supplied.)

There defendant's vessel plied on the Mississippi River from New Orleans, Louisiana, to a point in the state of Mississippi (two states). In the case at bar the vessel plied on the Detroit River from Michigan to a point in Canada (two countries). There a colored person sought to take passage between two points each in Louisiana (the vessel however touching during such voyage at an intermediate landing in Mississippi), she was refused transportation and the action followed. Here a colored person was refused such passage between Michigan and Ontario, Canada. The Supreme Court of the United States found the Louisiana statute to be void as an unconstitutional regulation by the State of Louisiana of interstate commerce. The State Supreme Court had construed the Louisiana statute as being applicable to vessels engaged in interstate (foreign) commerce (as did the Michigan

Court herein), and upon appeal, the federal Supreme Court found the statute void as an unconstitutional state regulation of interstate commerce.

In its opinion in the DeCuir case the Supreme Court found that interstate commerce was involved (although the passage was between two points in Louisiana) since waters of the Mississippi river lying in that state were also travelled upon, and proceeded to hold that the Commerce Clause gives to Congress the *exclusive* right to regulate interstate commerce. The court observed that although under its police power the state may pass health and inspection laws and pilotage acts, here the statute in question went beyond that point and—

> "does encroach upon the exclusive power of Congress," for it acts "directly upon the business as it comes into the State from without or goes out from within." It influences the management of the business of the carrier, and goes without the police power. Continuing the court remarked—"It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which, the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to obse ve one set of rules, and on the

other another. Commerce cannot flourish in the midst of such embarrassments. * * * Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by any one who felt himself aggrieved because he had been excluded on account of his color.

"This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws of new developments of trade. As was said by Mr. Justice Field, speaking for the court in *Welton v. The State of Missouri*, 91 U. S. 282, '*inaction* (by Congress) * * * *is equivalent to a declaration that inter-state commerce shall remain free and untrammelled.*'" (Emphasis supplied.)

The Mississippi River as the court stated passes "through or along the borders of ten different States" and "the commerce upon these waters is immense, and

its regulation clearly a matter of national concern." In the case at bar the traffic is upon the Detroit River (through which it is commonly remarked passes more traffic than any other body of water in the world), which forms a part of the Great Lakes waterway whose directly connecting waters touch upon Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, New York (eight states) and Canada, a foreign Country, (including two provinces of that foreign country, i.e., Ontario and Quebec). As was said in the DeCuir opinion "if the public good requires such legislation" on the Mississippi river, it is equally true upon the connecting waters of the Great Lakes, and such regulation "must come from Congress, and not from the States." It is respectfully submitted the DeCuir case is decisive and controlling herein.

The case of *Hall v. DeCuir, supra*, has been consistently followed by the Supreme Court of the United States for seventy years, the last of such occasions being in June, 1946, where a Virginia statute requiring that contiguous seats on interstate buses should not be occupied at the same time by persons of different races was held to be invalid under the commerce clause as burdening interstate commerce, *Morgan v. Virginia*, 328 U. S. 373. There Virginia had adopted a statute requiring common carrier passenger motor vehicles (both interstate and intrastate) to segregate white and colored passengers. The segregation provision was exceedingly mild, simply providing that contiguous seats be not occupied by persons of different races at the same time. A colored passenger refusing to so sit in the bus was fined for violation of the statute. The Supreme Court of Appeals of Virginia sustained the statute under the police power on the theory that, Congress not having acted, the State could act since the subject did not require uniformity of treatment. Upon appeal

to the United States Supreme Court, the statute, in an opinion by Mr. Justice Reed was found invalid as an unconstitutional exercise by the State of powers possessed by the Congress alone, i.e., the commerce power. The Court in its opinion again relied principally upon the DeCuir decision quoting at length from it, as did the concurring majority opinions. For example, at the beginning of Mr. Justice Frankfurter's opinion it is stated "But for me *Hall v. DeCuir,* 95 U. S. 485, is controlling. Since it was decided nearly seventy years ago, that case on several occasions has been approvingly cited and has never been questioned. Chiefly for this reason I concur in the opinion of the Court." There was but one dissenting voice in the Morgan case, that of Mr. Justice Burton. His opinion indicates that under the court's judgment all such state regulation of racial transportation matters is eliminated, and in the absence of federal legislation thereon such matters are unregulated, and left to the respective carriers (page 391). Upon principle the Morgan case and the case at bar cannot be distinguished and the wording of the Court's opinion is equally applicable to the Michigan Statute. The Michigan Statute does not require segregation but does *require* the public conveyance to furnish equal accommodations and privileges to all persons, and therefore is just as much of a regulation of interstate (foreign) commerce as was the Virginia Statute which has so recently been stricken down.

It is conceded Congress has not acted to regulate as to carriage of colored in interstate or foreign commerce of either passenger carriers by motor (Morgan case) or passenger water carriers such as defendant who do not maintain a joint through rate with a railroad or other carrier etc. (The very basis of appellee's claim to support the conviction of appellant is that because Congress has not

acted to legislate as to racial transportation of this defendant in its foreign commerce that the state may. If there were such racial *federal* legislation respecting this defendant in its business, then its conviction under the Michigan statute would be erroneous, the very ground which the State uses in its attempt to support the statute being cut away.) Since its decision in the Morgan case less than two years ago this Court has on four different occasions cited it as the most recent authority for the proposition that under the commerce clause state action is limited even though there be (as in the case before us) no Congressional action. *Joseph v. Carter & Weeks Stevedoring Co.*, 91 L. Ed. 720; *Fay v. People of the State of New York*, 91 L. Ed., 1517; *Richfield Oil Corporation v. State Board of Equalization*, 91 L. Ed. 123, and *Freeman v. Hewit*, 91 L. Ed. 205, where Mr. Justice Frankfurter on page 207 wrote "in two recent cases" (of which the Morgan case *supra* was one) "we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. *In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.*"

The Michigan statute and the stricken Louisiana statute (in the DeCuir case) provided for equal accommodations and privileges, (DeCuir case pp. 487). The Louisiana statute was voided in the DeCuir case as placing a burden by the state upon interstate commerce. So with defendant here. This defendant considers that for the profitable operation of its business it should exclude colored persons and certain others (R. 10, 11, 21). If the statute is upheld as to this defendant in its foreign commerce then a real burden will be placed upon it, not only that of a forced

change in established policy (R. 21) which from its experience it believes inadvisable, (and which amounts to substituting the judgment of the state for its own judgment in the management of its business), but one which for defendant's economic welfare as a result of the statute, might compel it to change the deck structure of its vessels at great expense, so as to segregate but still provide equal accommodations. Those are each real burdens. The DeCuir opinion points out others. In the Morgan case, *supra*, where the statute was stricken as an unconstitutional burden by the state on interstate commerce, the only burden was mild indeed, as there all the carrier would have had to do to comply with the statute would be to re-seat its passengers (if even that became necessary) upon crossing the Virginia line. In the case before us Ontario or Canada might pass a colored exclusion act as to vessels, or might pass an act providing for not equal but rather identical or mixed accommodations, which while in Ontario or Canadian waters this defendant would have to observe. Clearly it could not do so if while in Michigan waters it would have to observe the Michigan requirement. This is the possible identical confusion, lack of uniformity and consequent burden pointed out in the DeCuir case, (Note: All that is required is *possible* confusion, lack of uniformity etc.—there does not have to be *actual* confusion, lack of uniformity etc., for in the DeCuir case Louisiana had legislated and Mississippi had not, but there was the mere *possibility* that it might do so:) and also in this Court's principal opinion in the recent case of *Morgan v. Virginia, supra*, where is shown (pp. 382) the diversity of, *and lack of*, state legislation applying to racial transportation. In the case at bar, Canada and Ontario may be added to that list.

Another case with nearly identical facts is that of *Pryce v. Swedish American Lines*, 30 Fed. Supp. 371.

There plaintiff brought suit alleging in the second count discrimination because of color on a cruise from New York to South America (foreign commerce) bringing the action on this count under a New York statute prohibiting discrimination by a common carrier because of color. The statute was similar to Michigan's. (The Michigan statute is believed to have been drawn from the New York statute, *vide Cahill's N. Y. Consol. Laws* Ch. 41, Sec. 514). Upon motion to dismiss the count, the court held that the statute could not be construed to forbid discrimination between passengers by a common carrier engaged in foreign commerce, i.e., between New York and foreign countries, because if so construed "the statute undoubtedly would illegally interfere with foreign commerce" (page 372). The count was therefore dismissed, it being held the statute could not be sustained under the police power.

As illustrating the complex foreign nature of defendant's foreign business, the amount of federal regulation and the practical as well as legal impossibility of Michigan control, attention is called to the fact as set forth in the Statement of Facts herein, that its vessels, in order to proceed from Detroit U. S. A. to Bob-Lo, Canada, are required to have licenses to operate issued both by the Federal Government and by the Dominion Government. The vessels operate under enrollment issued by the United States, they are required to report and clear to the federal government, and are otherwise regulated by it, and are regulated by Canada as well (R. 8, 9). Canada (or a province as the case may be) may specify whom and how, and under what conditions defendant may transport when upon its waters, to say nothing of discharging passengers on its own soil of Bob-Lo. If Canada desires, it may by law exclude colored from its waters, or from its soil of BobLo. Michigan is powerless therein. The federal government alone could protest or act. As was said in *Glou-*

cester Ferry Company v. Pennsylvania, 114 U. S. 196, "otherwise there would be no protection against conflicting regulations of different states" (in our case Canada).

The fifth syllabus of *Wabash etc. Ry. v. Illinois*, 118 U. S. 557,8, reads—

> "A statute of a state, *intended to regulate* or to tax or to impose any other restrictions upon the *transmission of persons* or property or telegraphic messages from one State to another, is *not* within that class of legislation which the States may enact *in the absence of legislation by Congress;* and that such statutes are void *even as to that part of such transmission which may be within the state.*" (Emphasis supplied.)

Likewise in *Henderson et al. v. Mayor of New York*, 92 U. S. 259 it was held that local regulations of commercial matters which are not only national in character—*but international* (as in the case before us), must be governed by uniform rules, and that such may only be made by the Congress. See also *Board of Trustees v. U. S. A.*, 289 U. S. 48; and *Rhodes v. Iowa*, 170 U. S. 412.

Defendant might cite countless cases from this court upon the general subject, upon the general rule that states may not burden interstate or foreign commerce, upon the general rule of the police power of the states, etc., but counsel believes the same would only unduly lengthen this brief and unnecessarily so because this court has spoken in the precisely similar case of *Hall v. DeCuir, supra*, and also in the case of *Morgan v. Virginia, supra*. It is respectfully submitted that those decisions should be decisive herein.

As in most constitutional questions defendant has relied upon questions of powers, constructions and other legal, technical if you will, grounds, e.g., defendant is engaged

in foreign commerce and the DeCuir decision is controlling therein, as well as *Morgan v. Virginia. But there is something broader involved herein.* This Michigan legislation when attempted to be applied by that State to a business such as that carried on by defendant is *not* a regulation of *intrastate* business incidentally affecting interstate business. It is not even as if Michigan were attempting to regulate the intrastate portion of an interstate or foreign trip; *for in the case before us there is no intrastate portion,* the vessels proceed directly from Detroit to Bob-Lo, Canada without stopping at another point in Michigan. If there was an intrastate portion of the voyage we might concede for purpose of the argument that Michigan might conceivably regulate it, but there is none. In defendant's business it cannot take passengers on its vessels without transporting them to Canada. The effect of permitting the Michigan statute to apply to this defendant in its particular business is to give Michigan authority to legislate and regulate defendant's activity in another and completely foreign jurisdiction. The Michigan statute if it is to be validly applied herein compels defendant to transport persons to Canada. Any such extra-territorial effect of legislation is invalid, *vide* last paragraph of this court's opinion in *Morgan v. Virginia, supra* (page 386).

(c) Comment upon opinion below.

The argument above covers all but three portions of the reasoning of the opinion of the Supreme Court of Michigan which is reviewable herein. Those portions will now be discussed.

(1) The opinion of the Supreme Court of Michigan admits the DeCuir case is controlling but attempts to distinguish it from the case at bar by drawing so fine a line

that it fades into nothingness. There the Michigan Court in discussing the DeCuir case observed that therein "The court based decision upon the assumption that by reason of traversing the waters of various states and stopping at ports in such states" (R. 40) (two states only) "the carrier might meet with statutory requirements of various types, and with which the Louisiana statute might be in conflict and compliance with both would be quite impossible." So too in the case before us, the vessel stops at ports in two countries, and defendant herein is confronted with a similar statute, an identical burden, and the identical *possibility* of Ontario and/or Canadian contrary regulation which existed from the State of Mississippi in the DeCuir case, but to a much greater extent here because Ontario or Canada may lawfully regulate traffic on her waters and her island, while therein Mississippi could not constitutionally do so. Again how may it be said in the absence of gazing into a crystal globe as was stated in the opinion of the Supreme Court of Michigan that this "defendant in carrying on its commerce or transportation will not be subjected to an undue burden arising from conflicting regulations" (R. 41)? *Canada may act, it has the right.* Louisiana had its statute like Michigan, Mississippi had passed no contradictory regulation, the mere *possibility* that Mississippi *might* do so was the causation leading to the invalidation of the Louisiana statute. So likewise here, the province of Ontario or the Dominion of Canada may, indeed *have the right* (which Mississippi did not have constitutionally) to make valid regulations in utter conflict with Michigan's statute. From the very nature of things the matter of commerce between two countries becomes national and beyond the scope of the state. The Michigan opinion indicates a greater burden existed on interstate commerce in DeCuir then in the case before us but refrained from pointing out

what it was. It is respectfully submitted there was no greater burden, for the Louisiana and Michigan statutes are practically identical; in DeCuir the vessel's total run was only between two states, and in the case at bar between one country and another.

(2) The opinion below quotes from *Mitchell v. U. S.*, 313 U. S. 80 (R. 42), anent the Interstate Commerce Act (U. S. C. A. Title 49, Sec. 1, par. 3). Believing the Supreme Court of Michigan must have supposed that act applied to all common carriers, as its opinion states (R. 42), we call this court's attention to the fact the statute there involved applied only to interstate common carrier railroads and interstate water common carriers who maintain a joint through rate with a railroad, etc., U. S. C. A. Title 49, Sec. 1, (which defendant does not). Defendant is not in this category; if it were the Congressional Act would as shown above (pages 15-16) have superseded this State legislation and there could be no conviction under the latter. Congress has not passed any such color regulation for (a) interstate water passenger carriers such as defendant nor (b) for interstate passenger motor carriers. For such water and motor carriers the Supreme Court of the United States has held (in the DeCuir case for vessels and in the Morgan case for motor vehicles) that lack of such regulation by Congress is a declaration that they be kept free of such state regulation, and consequently any such attempted state regulation is invalid. See also *Freeman v. Hewit, supra.*

A reason of the Michigan Supreme Court for its opinion is that the Michigan statute is "indicative of the character of federal regulations in this field of law" (R. 42). However, as pointed out by Mr. Justice Reed in the Morgan case, "there is no federal act dealing with the separation of races" for interstate motor passenger carriers, nor is

there a federal act dealing with separation of races by water carriers such as defendant.

(3) The Michigan opinion states (R. 41) the Michigan statute "is in accord with the federal civil rights act." The two statutes are most dissimilar as to the matters sought to be regulated, the Federal Act covering *political* rights, and the Michigan Act covering civil matters, not political. Counsel has been unable to locate any Congressional Civil Rights Act (covering civil matters) applying even to that Congressional ward, the District of Columbia. On the contrary there is an act applying to the District which assumes segregation of the races in attendance at public schools, (District Columbia Code Title 31, Sections 1109-1113). The policy of the Congress therefore would seem to be plainly otherwise than as indicated by the opinion below.* As stated in (2) above Congress has deliberately excluded interstate and foreign water passenger carriers such as defendant (even assuming defendant is a common carrier which the Court below did not find (R. 43)), and interstate common carriers of passengers by motor, from the color legislation it has passed for practically all other types of common carrier, such as railroads, certain water common carriers who operate in connection with a railroad, etc., etc., thus indicating that as to them Congress in effect declares they should not be so regulated.

The familiar maxim *expressio unis est exclusio alterius* could find no better exemplification than in the case under consideration. Congress has acted to prevent segregation of the races by common carrier interstate railroads,

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*See "The Report of the President's Committee on Civil Rights" p. 63; pp. 87-95 (1947). Segregation in the District seems to be ill not legislated for, at least approved by additional Congressional action such as Organic Acts of 1873 and 1906 and other local legislation for the District.

(U. S. C. A. Title 49, Sec. 1, and Sec. 3, para. 1; *Mitchell v. U. S.*, 313 U. S. 80), and by common carrier interstate or foreign passenger water carriers if they maintain a joint through rate with another etc. (U. S. C. A. Title 49, Sec. 1). Congress of course has the right in its wisdom to legislate as to racial matters for passenger water carriers engaged in interstate or foreign commerce such as defendant. (As remarked above (pp. 15-16) if Congress had so legislated, the Michigan statute would admittedly be void or at least inapplicable to defendant). But Congress has not so legislated for those water carriers such as defendant, nor has Congress so legislated for interstate passenger motor carriers. Congress by its color legislation covering railroads and water carriers who maintain a joint through rate etc., has acted, and by its action shown its intent to allow passenger water carriers like defendant (for whom there is no federal legislation respecting carriage of colored), and motor carriers of passengers, to segregate or draw such color line as the management shall determine. In this respect the position of defendant is stronger than if Congress had not so acted as to any carrier, for then there might at least be an argument made that Congress not having acted at all was leaving the entire field to the states.

CONCLUSION

It is respectfully submitted the judgment of the Supreme Court of the State of Michigan should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 374

BOB-LO EXCURSION COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Appellee

Appeal from the Supreme Court of the State of Michigan

REPLY BRIEF FOR BOB-LO EXCURSION COMPANY, APPELLANT

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STATEMENT OF THE CASE

Appellant has no objection to the additional facts shown in the brief of appellee (other than believing them to be immaterial and possibly leading the reader to believe this is a case involving assault and battery, instead of what

it actually is, i.e., an exclusion of a colored person from foreign commerce), but with these other facts it should perhaps be pointed out that when the colored person was refused transportation at Detroit Michigan to Bob-Lo Island Canada, she was tendered the cost of her ticket in accordance with its terms, "Right reserved to reject this ticket by refunding the purchase price" (R. 7), which tender was refused (R. 4). Transportation from Bob-Lo to Amherstburg is not forbidden by Canadian authorities as intimated by counsel (R. 11).

ARGUMENT

(a) APPELLANT IS ENGAGED IN SUBSTANTIAL FOREIGN COMMERCE.

Appellee now for the first time concedes appellant to be engaged in foreign commerce, although throughout his brief he claims it to be "technical rather than substantial" (6), and "infinitesimal" (14). With these qualifications appellant completely disagrees. On the contrary a business corporation annually carrying approximately 500,000 persons (R. 7, 8) from Detroit to Canada, and using in Canada facilities for its passengers costing over half a million dollars (R. 6) to say nothing of the large value of its Detroit waterfront property and docks and vessels each carrying over 3,000 passengers and all devoted to this foreign business (R. 6), is very substantially engaged in a very real foreign commerce and of no "infinitesimal" proportions.

Appellee's counsel on page 14 of his brief confuses appellant's business which is foreign commerce, with the object of its passengers. Whether its passengers travel from Detroit to Canada for a "commercial purpose" is of no moment. What is important is that appellant is transporting them from Detroit to Canada as part of its foreign business. Appellee's brief in a number of places (6, 14) stresses the fact appellant is organized as a corporation under Michigan laws and is furnished police and fire protection by Detroit. This is of course immaterial as every domestic corporation is of necessity organized under the laws of some state and is furnished police and fire protection, but those facts have never prevented a corporation from claiming a state statute violates the fundamental law of the land any more than an individual is

estopped who resides in a State and is given police and fire protection therein. *16 C. J. Secundum*, 164, 5. Constitutional rights are not so easily snatched away.

(b) THE MICHIGAN CIVIL RIGHTS STATUTE MAY NOT CONSTITUTIONALLY BE APPLIED TO APPELLANT WHEN ENGAGED IN THE ABOVE FOREIGN COMMERCE ON ACCOUNT OF THE PROVISIONS OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The cause before us is a business case arising under the Michigan Civil Rights Act and the Commerce Clause; *not* one arising under the Civil Rights Act and the 14th Amendment. Counsel for appellee on page 9, 10 of his brief apparently argues that the policy of the Congress would be to compel the furnishing of equal facilities, but that its attempt to do so was thwarted *under the 14th Amendment* by this Court in the Civil Rights Cases, 109 U. S. 3. (In the opinion in the Civil Rights Cases and in its later companion *Butts v. Merchants and Miners Transportation Company*, 230 U. S. 126, it was held the Federal Act was void under the 14th Amendment, but it pointed out that the Congress could under the Commerce Clause have passed such type of valid act affecting interstate or foreign commerce, but that the preamble of the Act there involved negatived any such intent of the Congress.) The Congress *under the Commerce Clause* may if it desires constitutionally require equal transportation facilities be furnished by appellant and all other interstate and foreign carriers by simple legislation thereunder. It has already so legislated for interstate rails, and interstate water carriers operating under a joint through rate, *Mitchell v. U. S.*, 313 U. S. 80. As stated in appellant's main brief (pp. 23, 4) the maxim *expressio unis est exclusio alterius* applies, and in this respect the position of appellant "is

stronger than if Congress had not so acted as to any carrier, for then there might at least be an argument made that Congress not having acted at all was leaving the entire field to the States."

Throughout the brief of the State of Michigan appear intimations that the identical case of *Hall v. DeCuir*, 95 U. S. 485 should not be followed as being out of harmony with what counsel chooses to call the "social policy" of certain Congressional legislation. (Attention however is not called to the expressed contrary social policy of Congressional legislation affecting the District of Columbia). Counsel is asking this Court to lend itself as an instrument of "social control" (page 9) as if no other method was available. As pointed out on pages 22, 23 and 24 of appellant's original brief the remedy for establishing a new "social policy" rests in this case not with the courts, but with the Congress. The Congress under the Commerce Clause has that authority i.e., to compel all such carriers to carry all equally. The Congress has not so legislated.

As stated in appellant's original brief the case before us cannot be distinguished from *Hall v. DeCuir supra*, and opposing counsel's brief (p. 8) admits the practical identity of the Michigan and the Louisiana Statutes. Each statute sought to *directly regulate* interstate or foreign commerce and the Louisiana Statute was held void as a *direct regulation* of such interstate commerce. One involved transportation on the Great Lakes waterway, the other on the Mississippi River; one between two countries, the other between two states; both by vessels; both with practically identical statutes. The two cases present the identical regulation, possible confusion, lack of uniformity, and burdens. *Counsel for the State of Michigan in his brief fails to point out a single burden which existed in the DeCuir case which does not exist in the case at bar.* As to

possible confusion and lack of uniformity (no *actual* confusion being required, only the *possibility* thereof) counsel for appellee ventures into the realm of prophesy in his prediction (13) that the foreign country of Canada (or Ontario) will never impose different racial transportation requirements than Michigan now imposes. When we consider that in our own country eighteen states "prohibit racial separation on public carriers," a substantial number require it, and in the remaining ten there is no legal provision thereon, *(Morgan v. Virginia,* 328 U. S. 373, 382), then of necessity one must be the seventh son of a seventh son to so prophesy. This court has stated it will not prophesy even as to the "laws of the various states at a particular moment." *Freeman v. Hewit,* 91 L. Ed. 205, 210.

Counsel for appellee in his brief (13) argues that because a foreign nation is here involved in appellant's foreign commerce, there may be no uniformity of law in the absence of a treaty. It is clear that such a situation *cannot enlarge* the right of a State to regulate foreign commerce; the reverse is true. Foreign commerce is national in character and *requires* treatment only by the Federal Government and not by the States, *Lord v. Goodall S. S. Co.,* 102 U. S. 541, 544. The effort of Michigan to apply its statute to appellant in its Canadian transportation business is in effect an attempt by the State to give its statute an extraterritorial force, for there is no *intra*-state portion of the voyge from Michigan to Ontario, because the vessels *immediately* upon leaving Detroit cross the international boundary (R. 8, Cf. *Morgan v. Virginia,* 328 U. S. 373 at page 386).

We also call the Court's attention to *Pryce v. Swedish American Lines,* 30 Fed. Supp. 371, an all fours case mentioned in appellant's original brief, and which appellee does not even attempt to distinguish.

Appellant believes (as set forth on pps. 16, 17 of its original brief) there is no difference whatever between *Hall v. DeCuir, supra,* and the case at bar, (except the unimportant facts that in the former the traffic was upon the Mississippi river between two States, and in the latter upon the connecting waters of the Great Lakes between two countries), and unless overruled *Hall v. DeCuir* is decisive and should be followed. Opposing counsel has been unable to point out a single additional burden which existed in the DeCuir case which does not exist in the case before us. Both statutes are *regulations* of interstate commerce. *Hall v. DeCuir* in effect created a rule of property and therefore is not to be capriciously distinguished as counsel has attempted to do, nor under the principle of *Stare Decisis* to be lightly overruled. Appellant has relied upon the DeCuir decision, based upon identical facts, and if it is not followed may face large pecuniary damages in civil actions based upon the treble damage section of the Michigan statute. Were the DeCuir case to be overruled the ensuing confusion might be well nigh catastrophic, (and a glance at the Citator will indicate what a leading case it has become and how many decisions it has sired, the last of such offspring being the recent case of *Morgan v. Virginia, supra).*

It is again respectfully submitted the cause should be reversed.

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No. 374

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Supreme Court of the United States

OCTOBER TERM, 1947

BOB-LO EXCURSION COMPANY,
Appellant

v.

THE PEOPLE OF THE STATE OF MICHIGAN,
Appellee

Appeal from the Supreme Court of the State of Michigan

BRIEF FOR THE STATE OF MICHIGAN, APPELLEE

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1947

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BRIEF FOR THE STATE OF MICHIGAN, APPELLEE

I

Opinion Below [*]

The opinion of the court below (36), as appellant's counsel correctly states, is officially reported as *People of the State of Michigan v. Bob-Lo Excursion Company*, 317 Mich. 668, while the opinion of the court of first instance appears in the printed transcript of record (15).

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[*] Unless otherwise plainly indicated, numbers in parentheses throughout this brief refer to pages of the printed transcript of record.

II

Jurisdiction

We accept the statement of jurisdiction prepared by appellant's counsel.

III

Concise Statement of the Case

We trust the following additions to appellant's statement of the case, which is otherwise acceptable, will clarify the factual setting of this controversy:

1. The appellant corporation was organized under the laws of the State of Michigan[1] to engage in the business indicated by counsel in his brief, but incident thereto it is also authorized to acquire, own, hold and sell real and personal property in that state (5), and in 1945, when the case was tried, it had accepted from Michigan a beer and wine liquor license[2] in order that it might sell that commodity on its evening trips (11).[3]

The Detroit dockage facilities of the company, which it owns in fee, are located on the west side of Woodward avenue, and its vessels load there, after tickets have been

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[1] Michigan General Corporation Act: Mich. Stat. Ann. § 21.1 et seq.

[2] Act No. 8, § 24, Mich. Pub. Acts 1933, Ex. Sess.: Stat. Ann. § 18.995.

[3] The Wilson Act, 27 U.S.C. 121.

sold from booths (6) and taken up before the passengers board the boat, and 'it is taken for granted those on board have deposited a ticket' (10).

2. The boat company is in the business of transporting people to Bob-Lo and return[4] and providing recreation for them on the island (11); and while Bois Blanc Island,[5] which is owned by appellant in fee, forms part of Ontario, Canada (11), and though passengers who land there are subject to Canadian customs and immigration inspection (8), there are no means of transportation for them to the Canadian mainland at or near Amherstburg (11).[6]

3. Company policy to exclude negroes from their boats and the island had been in vogue for 21 years prior to 1945 and may have been prior to that. The assistant general manager testified (10) he knew of no occasion where a negro got passage to Bob-Lo; such a policy (he said) was to insure the continued success of the enterprise (11). As this witness phrased it (8), 'the defendant (appellant) adopted the policy of excluding so-called "Zoot-suiters", the rowdyish, the rough and the boisterous and it also adopted the policy of excluding colored' persons.

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[4] The fair inference to be gathered from the entire record is, we think, that such a return trip must be made the same day, for there is no evidence of over-night accommodations on the island.

[5] The term 'Bob-Lo', which has been locally resented, is a metropolitan corruption of 'Bois Blanc', the name given the island by the early French settlers.

[6] A further permissible inference is that such transportation is forbidden by the Canadian authorities.

4. While that policy continued in force during the summer season of 1945, the following incident occurred:

Sarah Elizabeth Ray, a resident of Detroit for 10 years, employed by the Detroit Ordnance District since May 1945, together with 40 other girls who were classmates in Commerce High School, planned to take a trip to Bois Blanc Island on June 21st under sponsorship of the Ordnance District which conducted a class in that school (3)[7]

On the morning of June 21st only 13 girls showed up at the foot of Woodward avenue in furtherance of such plans; Miss Ray was the only colored girl among them, the others being white (3).

Upon arrival at the appellant's dock, each of these girls paid 85 cents to Phyllis Walton, one of the group, who then purchased return tickets from Detroit to Bois Blanc Island and distributed them among the others;[8] whereupon the 12 white girls and the one colored girl passed through a gate, surrendered their tickets to the official in charge who

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[7]

The record is not clear as to the age of the complaining witness or other members of the group, but the implication is that they were employed in war work by the ordnance district, and that they attended a class organized for their benefit by the commerce school. At least that is the impression we gain after reading Miss Ray's testimony (3-5).

[8]

Bois Blanc Island, to which this colored girl purchased a return ticket, lies across a narrow channel of the Detroit River from the historic town of Amherstburg, a Canadian community not far from the scene of the Battle of Lake Erie. Fort Malden was built here in 1796, and at the close of the War of 1812 it was held by the Americans. Columbia Encyclopedia, 1940 Ed., p. 60. According to tradition, Amherstburg, was one of the termini of the Underground Railroad prior to the War between the States, and many negro slaves fled there for freedom.

accepted them, checked their coats on the boat (3), and went up on the top deck of the Steamer Columbia to sit down (4).

Shortly thereafter the group was approached by the assistant general manager of the company and the boat's stewart (4); Miss Reed, the girls' teacher asked them what they wanted; they in turn inquired if she knew the Ray girl; they said Miss Ray could not go along with the girls because she was colored, and, when the Ray girl told her teacher they were discriminating against her, both men got angry and told her she would have to get off the boat. One of the men then called to three white men in white uniforms, who were waiters in the restaurant, and told them to 'throw this woman off, and they all closed in on her and got excited; whereupon, the colored girl told them she would leave the boat. While she was being led off the vessel, the men told her she didn't have any right on the boat because it was a private concern, and they could keep her off if they wanted to (4).

IV

Summary of the Argument

1. We are in full accord with the opinion of the court below, 317 Mich. 691, that in view of the holdings of this Court in the cases here cited,[9], the defendant is engaged in foreign commerce', though we are also of the thought that certain outstanding facts related in the foregoing

[9]
Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1, 190-195;
Lord v. Steamship Co., 102 U.S. 541.

statement of the case,[10] indicate that appellant's "foreign commerce, is technical rather than substantial and that such facts bear directly and with considerable force upon the question 'whether the cited Michigan civil rights statute imposes an *unreasonable* (or *undue*) burden on foreign commerce'.

2. The Michigan Civil Rights Act, [11] which *inter alia* entitles all persons 'to full and equal accommodations, advantages, facilities and privileges . . public conveyances on land and water', is ancilliary rather than antagonistic to the spirit of § 1 of the Fourteenth Amendment; it is in step with the Federal Civil Rights Act, R.S. § 1977, 8, U.S.C. 41; and it is in perfect harmony and accord with the policy of the Congress exemplified in 'the sweeping prohibitions of the Federal Interstate Commerce Act, § 3, par 1, 49 U.S.

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[10]

That appellant's foreign commerce is confined to one-day-limit return pleasure trip by boat from a Michigan port to an Ontario island owned by the appellant in fee; that appellant is organized as a corporation under the laws of the State of Michigan; that its dock facilities in Detroit are under police and fire protection; that all ticket transactions occur in Michigan; these are facts which, among others, indicate what a light burden (if any) is cast upon the commerce by the Michigan Civil Rights Act.

[11]

Mich. Penal Code, § § 146-148, as amended by Act No. 117, Mich. Pub. Acts 1937; Mich. Comp. Laws Supp. 1940 § § 17115-146—17115-148; Mich. Stat. Ann. 1946 Cum. Supp. § § 28.343—28.346. It is historically significant that these sections of the Penal Code reenacted Act No. 130, Mich. Pub. Acts 1885, apparently in answer to The Civil Rights Cases (1883), 109 U.S. 3.

§ 3', [12] as construed and applied by this Court, *Mitchell v. United States*, 313 U.S. 80; it is, therefore, a permissible exertion of the State's *general* police power which in this particular instance at least, 'is of more importance than the federal government's *specific* police power in the absence of specific action by Congress';[13] hence, for the several reasons aforesaid, and because it does not restrict, restrain, limit, strangle, curb, or impede the flow of commerce,[14] the Michigan Civil Rights Act, in forbidding the appellant to deny its facilities and accommodations to colored persons solely on account of their race, cannot be said to place on foreign commerce an *undue* or *unreasonable* burden.

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[12]

"Paragraph 1 of § 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act 'to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever'. 49 U.S.C. 3. From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race". Mr. Chief Justice Hughes in Mitchell v. United States, 313 U.S. 91, 95.

[13]

Willis on Constitutional Law (1936), pp. 328-331. The author observes, among other things, that 'in the last few decades the Supreme Court has been permitting the states to exercise many forms of social control which indirectly or incidentally affect interstate commerce, when the states in doing so are undertaking to protect some of the general social interests of the people of the state, even where the interstate commerce is a matter of national concern and the federal government's power is regarded as exclusive'.

[14]

Cf. the Virginia statute declared unconstitutional by this Court in Morgan v. Virginia, 328 U.S. 373, and which declared a social policy directly opposed to that exemplified in the Michigan Civil Rights Act. See, also, Rice v. Santa Fe Elevator Corporation, 331 U.S. 218.

3. We do not, of course, agree with counsel's comments upon the opinion below.

V

The Argument

Historical Background of Michigan Act:

It might prove helpful, we thing, first to recall a few of those well-known historical events that led to the enactment of Michigan's Civil Rights Act (Act No. 130, Pub. Acts 1885), and thus place in true perspective the case on which counsel for appellant so strongly relies.

Hall. v. DeCuir, (1877), 95 U.S. 485.

> "Civil Rights legislation made its first appearance shortly after the close of the civil war. . . . As might be expected, however, the greatest impulse in these early days came from the reconstructionists who had taken over the state governments in the south. Thus the State of Louisiana had an 'equal rights' provision in its constitution of 1868."[15]

On Feb. 23, 1869, the Louisiana General Assembly enacted a law, La. Acts of 1869, p. 37, Rev. Stat. La. 1870, p. 93, which is interpreted by her highest court requiring all passengers, irrespective of color, to have equal privileges. And in 1877 this Court in the case of *DeCuir, supra,*

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[15]

May 1947 Iowa Law Review, Vol. 32, No. 4, article entitled: 'Exclusion, Ejection, and Segregation of Theater Patrons', sub-title, "(1) Civil Rights Statutes', p. 631 et seq. We are indebted to this and other law review articles for much of this preliminary material.

held such legislation to be a regulation of interstate commerce, a direct burden thereon, and therefore void.[16],

> "The climax to the movement for civil rights legislation in this period came with the enactment of the Civil Rights Bill of 1875 (18 Stat. 335 [1875] by the Congress. This statute was the most elaborate legislation yet adopted anywhere. Phrased positively, it sought to insure 'the full and equal enjoyment' of the accommodations, advantages, facilities, and privileges of inns, public conveyances, theaters, and other places of public amusement; subject only to the conditions established by law and applicable alike to citizens of every race and color."[17]

In 1883, however, this Court, in the

Civil Rights Cases (1883), 109 U.S. 3,

held the first and second sections of that law unconstitu-

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[16]

Mr. Justice North, who wrote for the court below, gave careful consideration, 317 Mich. 692-694, to the various decisions upon which appellant relied, particularly Hall v. DeCuir, and he succeeded, we submit, in drawing many valid distinctions between DeCuir and the case at bar. There is little we can add thereto unless it be to invite the Court's attention to a circumstance which cannot be overemphasized: that in the last few decades this Court has been permitting the States 'to exercise many forms of social control which indirectly or incidentally affect interstate commerce, when the States in so doing are undertaking to protect the general social interests of the people of the state'. Willis on Constitutional Law, p. 328.

[17]

May 1947 Iowa Law Review, p. 632. See also 43 Am. Law Review, p. 547, for article on 'Race Distinctions in American Law', and treating more particularly of 'The Civil Rights of Negroes', by Gilbert Thomas Stephenson.

tional as applied to the several states, not being authorized either by the 13th or 14th Amendments of the Constitution.

The foregoing historic decision of this Court rested on two principles:[18] (1) that the 14th Amendment nullifies all state legislation, and state action impairing privileges of citizens or injuring them in life, liberty or property without due process of law, or denying equal protection of laws; and (2) that the 14th Amendment was designed to prohibit state invasion of equal civil rights, and to authorize Congress to adopt appropriate legislation for correcting effects of prohibited state laws, but not to authorize enactment of laws for the equal protection of civil rights. And it has resulted in leaving much, if not all, of such social legislation to the States' domain.'

In 1885, then, Michigan entered the vanguard of those States whose legislatures enacted laws designed to protect large segments of their population from unjust consequences of racial discrimination. Act No. 130, Pub. Acts of Mich. 1885 was enacted 'to protect all citizens in their civil rights.'[19]

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[18] As phrased in Rose's Notes, Vol. 12, pp. 105, 106.

[19] The Michigan Supreme Court in an early case, Ferguson v. Gies, (1890), 82 Mich. 358, 365, held this statute to be declaratory of the common law under which the colored man 'was entitled to the same rights and privileges in public places as the white man, and he must be treated the same there'. And for other Michigan statutes prohibiting discrimination by schools, see § § 15.76, subd. (1); 15.380; validating prior inter-racial marriages, § 25.6; and prohibiting life insurance companies from discriminating, § 24.293, all citations being Mich. Stat. Ann.

In 1931 the Michigan legislature passed the Penal Code of that State, Act No. 328, Pub. Acts 1931, and reenacted the State Civil Rights Act as § § 146-148 thereof, Comp. Laws 1940 Supp. § § 17115-146-17115-148, Stat. Ann. § § 28.343-28.345.

And in 1937 the foregoing sections of the Penal Code were amended, Act No. 117, Pub. Acts 1937, to extend their range. For full text, see Appendix A.

Questions Presented:

Two questions arise: (1) whether the Michigan Civil Rights Act, as applied to appellant's excursion business, places on such foreign commerce an undue, unreasonable, and therefore an unconstitutional burden in violation of the Commerce Clause; and (2) whether the Act so interferes with the exclusive jurisdiction of Congress over foreign commerce as to render it invalid as applied to appellant.

1

The Michigan Civil Rights Act, as applied to appellant's excursion business, imposes on foreign commerce no undue or unreasonable burden.

In *Morgan v. Virginia*, 328 U.S. 373, this Court considered provisions of a Virginia statute which required the *separation* of white and colored passengers on both interstate and intrastate motor carriers, and held them invalid as applied to interstate passengers in vehicles moving interstate, because they burdened interstate commerce, even though Congress has enacted no legislation on the subject.

The Court, through Mr. Justice Reed, appraised (p. 381) 'the *weight* of the Virginia statute on interstate commerce', and in so doing noted that the factual situation 'emphasizes the soundness of this Court's early conclusion in *Hall v. DeCuir*, 95 U.S. 485', and said:

> "As our previous discussion demonstrates, the transportation difficulties arising from a statute that requires *commingling* of the races, as in the *DeCuir* case, are increased by one that requires *separation*, as here". [Emphasis supplied].

The opinion of the Court in *Morgan* rests on the principle that 'state legislation is invalid if it *unduly* burden's interstate commerce where uniformity is necessary in the consitutional sense of useful in accomplishing a permitted purpose' (Syl. 4), and upon the fact that confusion would result from a diversity of state laws governing the same interstate transportation transactions. Or, as Mr. Justice Frankfurter expressed it in his concurring opinion, p. 388, 'The imposition upon national systems of transportation of a crazy-quilt of State laws would operate to burden commerce *unreasonably*, whether such contradictory and confusing State laws concern racial *commingling* or racial *segregation*'.

The Court, p. 384, quoting in note 29 from the opinion of Mr. Chief Justice Waite in *DeCuir*, at p. 489, indicates the reasons for such a rule as applied to interstate commerce:

> "It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense,

and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion like to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate".

Merely to read the foregoing quickly demonstrates the inapplicability of such principles to the Michigan Act as applied to the 'foreign commerce' of the Bob-Lo Excursion Company.

1. In the foreign commerce presently involved, such as it is, absent a treaty between Canada and the United States, there can be no uniformity of law (though within this particular field there appears not the slightest possibility of conflict, for one cannot imagine the Canadian Parliament enacting a statute requiring the *segregation* of colored passengers on Bob-Lo boats or *forbidding* their transportation).

2. The 'foreign commerce' which in a technical sense is carried by appellant's vessels is all but infinitesimal. While its passengers are transported from an American port to a Canadian Island, their stay in the Dominion is limited to a few hours of recreation; they do not journey abroad for any commercial purpose; and, so far as each patron is concerned, he might just as well be going to one of many American islands at the mouth of the Detroit River.

Moreover, the Bob-Lo Excursion Company is a Michigan corporation doing business under protection of Michigan laws, and its property in Detroit, its docks and buildings, its vessels while at the wharf, all are subject to police protection furnished by the State.

Appellant's vessels carry no freight; they transport no Canadian passengers to the United States (unless through happenstance); and they take little part in the flow of commerce between the two countries.

It therefore becomes clearly apparent that all of the appellant's business transactions are with Michigan residents (unless one takes into account the occasional out-state visitor to Michigan).

What burden is there on such commerce? Is it 'undue or unreasonable' or both? And how can it be said that Michigan's Civil Rights Act, when applied to appellant's business, in any manner impedes, obstructs, restricts, or curbs the flow of commerce between the United States and the Dominion of Canada?

We, therefore, respectfully submit that the Act in question here, as applied to appellant, imposes on foreign commerce no undue or unreasonable burden.

2.

The Michigan Civil Rights Act, as applied to appellant, does not so interfere with the exclusive jurisdiction of Congress over foreign commerce as to render it invalid.

As long ago as 1890, the court below, when applying Michigan's Civil Rights Act of 1885, found the policy of this State to be that 'any discrimination founded upon the race or color of the citizen is unjust and cruel, and can have no sanction in the law of this state'. *Ferguson v. Gies*, 82 Mich. 358, at 365. And that policy, so declared, has never been abandoned.

In 1895, our court held that 'a state may enact laws for the protection of the health, lives, and property of its people in respect to those subjects over which Congress has the power to legislate, and such laws are valid and may be enforced so long as they do not conflict with Federal legislation'.

Burrows v. Delta Transportation Co., 106 Mich. 582.

This latter opinion in *Burrows v. Delta Transportation Co.*, is in harmony with recent decisions of this Court:

Terminal Railroad Association v. Trainmen, 318 U.S. 1, holding in the absence of federal legislation which conflicts or occupies the field, it is within the authority of a State, in the interest of health and safety of employees, to require a terminal railroad, though engaged largely in interstate commerce, to provide cabooses on trains within the State on designated runs;

Cf.

Southern Pacific Co. v. Arizona, 325 U.S. 761.

Although the Illinois law drawn in question in the *Terminal Association* case required the appellant to provide cabooses on trains '*within* the state', and while the Arizona law considered invalid by this Court in the *Southern Pacific* case seemed to apply only intrastate (though it was held to affect interstate commerce), we are persuaded that the principles announced for the Court by Mr. Justice Jackson and the late Mr. Chief Justice Stone, are applicable here.

We, therefore, renew the suggestions made in our summary of the argument:

1. It is conceded in appellant's brief, p. 15, that Congress has not acted to regulate within this particular field; and, we respectfully submit, there is no federal legislation which conflicts with the Michigan Civil Rights Act.

2. The Michigan Act is in spirit and principle ancillary rather than antagonistic to the first section of the Fourteenth Amendment, though we must admit this *alone* would not save the statute if it violates the Commerce Clause.

3. We repeat: the Michigan law is in step with the Federal Civil Rights Act, R.S. § 1977, 8 U.S.C. 41, and it is in harmony with the public policy of this Nation as declared by the Congress in the Interstate Commerce Act, § 3, par. 1, 49 U.S.C. § 3, as construed and applied by this Court,

Mitchell v. United States, 313, U.S. 80.

We, therefore, respectfully submit that since Congress has not acted to protect the colored citizens of Michigan from the racial discrimination practiced by the Bob-Lo

Excursion Company, since the Michigan Act does afford such protection, and since enforcement of the local law leads to no confusion in foreign commerce, the Michigan Civil Rights Act should be upheld as constitutional. In short, until Congress sees fit to occupy the field, the class of citizens affected by the policy of the Bob-Lo Excursion Company should not be left to occupy the No-man's Land which appellant in this case urges the Court to mark out.

VI

Conclusion

It is respectfully submitted the judgment of the Supreme Court of the State of Michigan should be ~~reversed~~ affirmed

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APPENDIX 'A'

The Michigan Civil Rights Law[*]

"**Sec. 146.** All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, restaurants, eating houses, barber shops, billiard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on esculators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, where refreshments are or may hereafter be served, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices.

"**Sec. 147.** Any person being an owner, lessee, proprietor, manager, superintendent, agent or employe of any such place who shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities and privileges thereof or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communications, notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any such places shall be refused, withheld from or denied to any person on account of race, creed or color or that any particular race, creed

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[*] Mich. Penal Code, § § 146-148, as amended by Act No. 117, Mich. Pub. Acts 1937; Mich. Comp. Laws Supp. 1940 § § 17115-146-17115-148; Mich. Stat. Ann. 1946 Cum. Supp. § § 28.343-28.345.

or color is not welcome, is objectionable or not acceptable, not desired or solicited, shall for every such offense be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five (25) dollars or imprisoned for not less than fifteen (15) days or both such fine and imprisonment in the discretion of the court; and every person being an owner, lessee, proprietor, manager, superintendent, agent or employe of any such place, and who violates any of the provisions of this section, shall be liable to the injured party, in treble damages sustained, to be recovered in a civil action: Provided, however, That any right of action under this section shall be unassignable.

"**Sec. 148.** No citizen of the state of Michigan, possessing all other qualifications which are or may be prescribed by law, shall be disqualified to serve as grand or petit juror in any court of said state on account of race, creed or color, and any officer or other person charged with any duty in the drawing, summoning, and selection of persons who shall exclude from, fail, neglect and/or refuse, by words, trick and/or artifice, to draw the name of, summon and/or select any citizen for jury service because of his or her race, creed and/or color, shall be guilty of a misdemeanor and upon conviction shall be fined not less than fifty (50) dollars or shall be imprisoned for a period of not less than thirty (30) days, or both such fine and imprisonment in the discretion of the court."

Appendix 'B'

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No. 374

Supreme Court of the United States

OCTOBER TERM, 1947

BOB-LO EXCURSION COMPANY, a Michigan Corporation,

Appellant,

against

THE PEOPLE OF THE STATE OF MICHIGAN.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF OF THE AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

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December 1947

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Konvitz, The Constitution and Civil Rights (1947) 8

McNamara, Jurisdictional and Commerce Problems, 8 Law and Contemporary Problems 482 (1941) 16

To Secure These Rights, Report of President's Committee on Civil Rights (Gov. Printing Office, 1947) 2, 10, 11

No. 374

Supreme Court of the United States

OCTOBER TERM, 1947

BOB-LO EXCURSION COMPANY, a Michigan Corporation,
Appellant,

against

THE PEOPLE OF THE STATE OF MICHIGAN.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF OF THE AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

Interest of the American Jewish Congress

The American Jewish Congress was organized in part "* * * to safeguard the civil, political, economic and religious rights of Jews everywhere" and "* * * to help preserve, maintain and extend the democratic way of life".

In the three decades of its existence the American Jewish Congress, on frequent occasions, has represented the democratic interests of the Jewish people before the courts, legislatures and administrative tribunals of the State and Federal governments. Its work, however, has never been confined to the interests of the Jewish people alone. It believes, indeed, that Jewish interests are threatened whenever persecution, discrimination or humiliation are in-

flicted upon any human being because of his race, creed, color, national origin or ancestry.

In accordance with these principles, the American Jewish Congress has long held that, as stated by the President's Committee on Civil Rights (Report, p. 135, Government Printing Office, 1947): "All of our governments, federal, state, and local, must be uncompromising enemies of discrimination, which is prejudice come to life." The statute which is invoked in the present proceeding rests on just that principle. The attack upon that statute is an attempt to limit the power of state governments to enact laws designed to suppress the evil of racial discrimination. Such an attempt is a matter of deep concern to the American Jewish Congress and requires that it submit its views to this Court.

Counsel for appellant and appellee have consented to the filing of this brief.

Statement of the Case

The appellant challenges its conviction under the Michigan Civil Rights Statute on the charge of refusing to carry a Negro passenger on its vessel. It contends that application of that statute to its operations is an infringement upon the grant to Congress of the power to regulate foreign commerce. The question presented is whether the State of Michigan may by statute require the operator of a public conveyance to make its facilities available to all persons, regardless of their race or color, where the conveyance is engaged in carrying passengers from a Michigan port to an island in Canadian waters and back to Michigan.

The facts disclose that appellant's vessels carry excursion passengers from Detroit to Bob-Lo Island in the Canadian waters of the Province of Ontario, Canada (R. 6). The island is owned by the appellant, except for a small area which is fenced off from the rest of the island (R. 6). Appellant has erected amusement buildings, athletic

grounds, bathing beaches, restaurants and other facilities on the island, for use during the summer months (R. 6). Two vessels are operated from Detroit to Bob-Lo Island, each carrying up to in excess of 3,000 passengers (R. 6). During the summer of 1945 approximately 500,000 passengers were carried on the two boats to Bob-Lo Island (R. 8). The appellant advertises for passengers in three Detroit newspapers and also uses street car advertising (R. 11). There is no means of access to Bob-Lo Island except by way of the appellant's vessels (R. 8).

The appellant, a Michigan corporation (R. 5), is not subject to rate or other general regulation by any Federal or State agency (R. 7), but it is subject to steamboat inspection by the United States Navy Department (R. 8-9) and is licensed by the United States Customs Service with respect to customs on dutiable goods (R. 8).

On June 21, 1945, appellant ejected Sarah Ray from its excursion boat and refused her passage on the ground that she was a Negro (R. 3-4). This was admitted by appellant (R. 6). The appellant's conviction on the charge of violating the Michigan Civil Rights Statute (R. 35) and judgment imposing a fine of twenty-five dollars (R. 13), were affirmed by the Michigan Supreme Court (R. 44, 48).

The Statute Under Which Appellant Was Convicted

The Michigan Civil Rights Statute under which appellant was convicted provides as follows (Act No. 117, 1937 Pub. Act; Mich. Stat. Ann. 1946 Cum. Supp., Section 28.343, also designated as Section 17115-146-147; Mich. Comp. Laws 1940):

> Sec. 146. All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, restaurants, eating houses, barber shops, billiard parlors, stores, public conveyances on land and water, theaters, motion picture houses, public educational in-

stitutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodations, amusement, and recreation, where refreshments are or may hereafter be served, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices.

Sec. 147. Any person being an owner, lessee, proprietor, manager, superintendent, agent or employee of any such place, who shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities and privileges thereof or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communications, notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed or color or that any particular race, creed or color, is not welcome, objectionable or not acceptable, not desired or solicited, shall for every such offense be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than fifteen (15) dollars nor more than one hundred (100) dollars or shall be imprisoned in the county jail for not less than ten (10) days nor more than ninety (90) days or both such fine and imprisonment in the discretion of the court.

Summary of Argument

This is not a segregation case. It is a case of discrimination against a Negro by a complete denial of facilities and accommodations made available to persons of other races and colors. It is our contention that a State may by statute require the operator of public conveyances to make its facilities available to persons of all races and colors in carrying passengers from a port within the State to an island in foreign waters and back.

The validity of legislation prohibiting such discrimination in intrastate commerce has been established by this

Court as a proper exercise of the State's police power. In the absence of Congressional action (the appellant is not a common carrier as defined by the Interstate Commerce Act), a State statute regulating carriers will not be invalidated, as applied to interstate or foreign commerce, unless it imposes an undue burden on the commerce. A finding of undue burden requires a factual determination that the State police power must yield because of a compelling national requirement of uniformity of regulation of the particular subject in interstate or foreign commerce.

There is no national interest in striking down a State requirement that public conveyances engaged in foreign commerce open their facilities and accommodations to persons of all races and colors. The State statute is no more than an extension to public conveyances of the common law duty to provide equal facilities to all persons, a duty which this Court has held the State may require of common carriers engaged in interstate commerce. The vice in State regulations of interstate or foreign commerce which have been invalidated by this Court by reason of the unexercised grant to Congress of the commerce power, namely, the danger of undue burdens on the commerce through conflicting and diverse State regulations, is absent in the present case. No State can constitutionally require interstate or foreign carriers or conveyances to discriminate in their accommodations or facilities by reason of the race or color of passengers in view of the Equal Protection Clause of the Fourteenth Amendment. That clause thus insures uniformity of any State regulation which may be adopted. No undue burden is, therefore, imposed on commerce by the Michigan civil rights regulation challenged by the appellant.

ARGUMENT

The statutory requirement that the appellant afford its transport facilities to all persons irrespective of race or color does not impose an undue burden on foreign commerce.

A. The requirement of the Michigan statute that accommodations be provided for all passengers regardless of race or color cannot be invalidated unless this Court determines that the requirement imposes an undue burden on commerce.

The doctrine that State legislation may be invalidated as conflicting with the interstate or foreign commerce clauses of the Federal Constitution, in the absence of Congressional exercise of the power granted to regulate the commerce, is rooted in the danger that diverse or conflicting State legislation may unduly impede national or international commerce. From *Gibbons* v. *Ogden* (9 Wheat. 1 [1824]), in which the Commerce Clause issue first reached the Court, to *Cooley* v. *Board of Wardens* (12 How. 299 [1851]), in which the Court adopted the basic principles which have since served as its guideposts, to its most recent decisions (see *Southern Pacific Railway* v. *Arizona*, 325 U. S. 761 [1945]); *Morgan* v. *Commonwealth of Virginia*, 328 U. S. 373 [1946]), this Court has found it necessary to make a judgment in each case as to the impeding effects upon commerce of the particular State regulation under attack.

As stated by this Court at the last term:

> • • • state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract,

its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific determination as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle, the cases turn on their own facts (*Morgan* v. *Commonwealth of Virginia*, 328 U. S. 373, 377-378 [1946]).

As this Court has said in judging the validity of a State regulation, "reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved" (*Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769 [1944]).

B. There is no warrant for a determination that an undue burden is imposed on foreign commerce by the State's requirement of full and equal accommodations for Negroes.

In making its "ultimate determination • • • of the nature and extent of the burden which Michigan's regulation • • • imposes on" commerce, this Court must make an "appraisal and accommodation of the competing demands of the state and national interests involved" (*Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 796 [1944]).

(1) The State Interest.

The State statute as applied to the appellant requires that it provide accommodations and facilities to Negroes on its excursion vessels. The State interest in imposing such a requirement is the protection of the civil rights of its citizens against discrimination by reason of race or color. That this is a proper exercise of the State's police power, at least in cases involving intrastate commerce, is clearly established (*Railway Mail Association* v. *Corsi*, 326 U. S. 88 [1945]; *Greenberg* v. *Western Turf Association*, 204 U. S. 359 [1907]; *People* v. *King*, 110 N. Y. 418 [1888]. See, also, the cases collected in 49 A. L. R. 505, *et seq.*).

Michigan is not alone in the policy embodied in its Civil Rights Statute. Seventeen other States have enacted legislation requiring full and equal accommodations to all citizens on public conveyances and in other public places, without discrimination as to race or color.[1]

(2) The Appellant's Contention as to the Burden on Commerce.

The only suggestion in the case as to any actual burden on commerce are the unsupported testimony of the appellant's Assistant Manager that it "is the policy of the boat company to exclude Negroes on those boats, to insure the continued success of the enterprise" (R. 11); and the appellant's argument in its brief that it will be required, if the statute is upheld, to adopt a business policy as to carrying Negroes which appellant regards as undesirable, and that this policy might compel it to change the deck structure of its vessels, at great expense, in order to segregate Negroes and still provide equal accommodations (R. 17).

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[1] Cal. Civil Rights Stat., Secs. 51-52; Colo. Stats. 1935, Ch. 35, Secs. 1, 8; Conn. Gen. Stats. (Supp. 1933), Sec. 1676c; Ill. Rev. Stats. (1941), Ch. 38, Sec. 125; Ind. Stats. Ann. (Burns, 1933), Sec. 10-901; Iowa Code (1939), Sec. 13251; Kansas Gen. Stats. Ann. (1935), Sec. 21-2424; Mass. Laws (Michie, 1933), Ch. 272, Sec. 98, as amended in 1934; Minn. Stats. (Mason, 1927), Sec. 327.09; Neb. Comp. Stats. (1929), Ch. 23, Art. 1, Sec. 101; N. J. Rev. Stat., 10:1-2, 3, 5; N. Y. Civil Rights Law, Sec. 40; Ohio Code (Throckmorton, 1933), Sec. 12940; Pa. Stats. (Purdon), Tit. 18, Secs. 4653-4654; R. I. Gen. Laws (1938), Ch. 606, Sec. 28; Wash. Rev. Stats. (Remington, 1932), Sec. 2686 (statute does not specifically mention public conveyances, but is phrased in broad, general language); Wis. Stats. (1941), Sec. 340.75. See Konvitz, The Constitution and Civil Rights (1947), in which the statutes referred to have been collated. The enactment of these statutes followed the decision of the Supreme Court in the *Civil Rights Cases* (109 U. S. 3 [1883]) holding the Federal Civil Rights Act of 1875 unconstitutional as applied to discrimination against Negroes by individuals. The language of many of these statutes closely follows that of the Federal act. See Konvitz, Chs. 2 and 7.

This does not add up to an "undue burden" on commerce in the light of the "national interest" involved. The statute neither requires nor forbids segregation. If the appellant should choose to adopt a policy of segregating its white from its Negro passengers, it cannot complain of the costs of such segregation in attacking the statute. Moreover, numerous State regulations of interstate transportation requiring substantial financial outlays by carriers have been upheld by this Court. (See e.g., *Chicago R. I. & P. R. Co.* v. *Arkansas*, 219 U. S. 453 [1911], requiring full crews on interstate trains; *Terminal R. Ass'n* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1 [1943], requiring cabooses on freight trains; and see the cases collected in *Morgan* v. *Commonwealth of Virginia*, 328 U. S. 373, 378, Note 16 [1946].)

(3) The National Interest.

The gist of appellant's contention is that it is entitled to untrammelled freedom to bar Negroes from its vessels and that a restriction on that freedom is *ipso facto* an undue burden on commerce. This view completely misconceives the constitutional principle that a State regulation of commerce will not be invalidated unless it imposes an undue burden on commerce. Collision of the State regulation with a national interest which must be protected is essential in order to establish an undue burden on commerce.

There is no conflict between the State's requirement and the national interest in preventing impediments to commerce. There is no national interest in depriving Negroes of accommodations in interstate or foreign commerce. Indeed, there is a national interest to the contrary, which the Michigan statute seeks to carry out, namely, that full and equal accommodations be provided for all persons regardless of race or color (*McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.*, 235 U. S. 151 [1914]; *Mitchell* v. *United States*, 313 U. S. 80 [1941]).

There is a well-defined national policy embodied in Congressional legislation in harmony with the Michigan statute. The Interstate Commerce Act requires common carriers subject to its provisions to provide equal facilities for all passengers, Negro or white (49 U. S. C., Sec. 3(1); see *Mitchell* v. *United States*, 313 U. S. 80 [1941]). Similar provisions apply to carriers by water and air (46 U. S. C., Sec. 815; 49 U. S. C., Secs. 484, 905).

In the recent Report of the President's Committee on Civil Rights, made pursuant to Executive Order 9808, To Secure These Rights (Gov. Printing Office, 1947), it is stated (pp. 76-77):

> **Discrimination in places of public accommodation.**—When we turn from public services supplied by government to those supplied by private enterprises, discrimination against minorities becomes more pronounced. Our social conscience has brought about an elimination of some of the most flagrant inequalities in the distribution of government services. But it is often blind to the serious effect upon the individual which results from the discriminatory rendering of service by private agencies.
>
> Most Americans patronize restaurants, theaters, shops, and other places offering service to the public according to their individual preferences and their ability to pay. They take their right to enter such places and to be served for granted. This is not the case with other Americans. Because of their race or their color or their creed, they are barred from access to some places and given unequal service in others. In many sections of this country, some people must pause and give thought before they enter places serving the public if they wish to avoid embarrassment, arrest, or even possible violence.

The Committee recommends the following proposal, *inter alia*, to deal with discrimination in public services (pp. 170-171):

> **The enactment by the states of laws guaranteeing equal access to places of public accommodation,**

broadly defined, for persons of all races, colors, creeds, and national origins.

Since the Constitution does not guarantee equal access to places of public accommodation, it is left to the states to secure that right. In the 18 states that have already enacted statutes, we hope that enforcement will make practice more compatible with theory. The civil suit for damages and the misdemeanor penalty have proved to be inadequate sanctions to secure the observance of these laws. Additional means, such as the revocation of licenses, and the issuance of cease-and-desist orders by administrative agencies are needed to bring about wider compliance. We think that all of the states should enact such legislation, using the broadest possible definition of public accommodation.

We submit that any proper appraisal of "the competing demands of the state and national interest" requires the conclusion that there is not the slightest Federal interest in striking down the Michigan prohibition against discrimination in providing services on public conveyances on account of race or color. There is, therefore, no undue burden on commerce.

C. The decisions of this Court sustaining the power of the States, in the absence of Congressional action, to enforce the common law rule of equal service against interstate common carriers support the constitutionality of the Michigan statute.

This Court has upheld the right of States, in the absence of Congressional action, to enforce the common law rule of equal service against interstate common carriers. In *Missouri Pacific Railway* v. *Larabee Mills* (211 U. S. 612 [1909]), the Court sustained the enforcement by judicial proceedings of the right of equal service against a railroad engaged in interstate commerce. The Court said (211 U. S. at pp. 619-620):

> • • • No legislative enactment, no special mandate from any commission, or other administrative board

> was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts.

A State may provide a statutory penalty to be paid by a railroad engaged in interstate commerce for failure to comply with the similar common law duty that it promptly settle claims for loss of or damage to freight (*Atlantic Coast Line R. R.* v. *Mazursky*, 216 U. S. 122 [1910]). Similarly, States may, by statute, enforce the duty to deliver interstate telegraph messages and to transmit them without delay (*Western Union Telegraph Co.* v. *Jones*, 162 U. S. 650 [1896]; *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364 [1911]).

It follows that a statutory requirement that equal service be afforded to all, when applied to an interstate public conveyance which is not a common carrier, is no more an interference with or burden on interstate or foreign commerce than such a requirement applied to a common carrier. The fact that the one was subject to such a requirement under the common law, while the obligation on the part of the other has been imposed by statute, in no way alters the effect of the requirement on interestate or foreign commerce.

This Court dealt with precisely such a contention in *Western Union Telegraph Co.* v. *Commercial Milling Co.* (218 U. S. 406 [1910]). It said (p. 414):

> This presents the seeming paradox that a prohibition against a limitation of liability, if prescribed by the common law, would be valid, and that a like prohibition, prescribed by a statute would not be.

It went on to say (pp. 416-417):

> We cannot concede such effect to the common law and deny it to a statute. Both are rules of conduct

proceeding from the supreme power of the State. That one is unwritten and the other written can make no difference in their validity or effect.

Nor does the fact that the vessel travels on waters beyond the jurisdiction of Michigan and has a terminus on a Canadian island affect the situation. A State, as well as the Federal Government, may legislate with regard to the duties of its citizens on the high seas and in foreign ports so long as there is no conflict with Congressional action (*The Hamilton*, 207 U. S. 398 [1907]; *Skiriotes* v. *Florida*, 313 U. S. 69 [1941]; *cf. United States* v. *Rodgers*, 150 U. S. 249, 264-265 [1893]; *Wilmington Transportation Co.* v. *California*, 236 U. S. 151 [1915]; *Port Richmond Ferry Co.* v. *Hudson County*, 234 U. S. 317 [1914]; *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187 [1912]).

In *Skiriotes* v. *Florida* (313 U. S. 69, 73 [1941]), it was pointed out that a State may govern the conduct of its citizens even when they are in a foreign country "when the rights of other nations or their nationals are not infringed". Here we have a Michigan corporation which carries passengers from a Michigan port to a Canadian island which it wholly owns (aside from a small, fenced-off portion) and which apparently is used only by people brought to it by appellant. Thus there is no infringement on the rights of Canada or its nationals. Certainly, no such infringement has been shown.

Although the appellant is not a common carrier, it operates excursion boats which the court below has held are "public conveyances" within the meaning of the statute. Appellant's vessels are not small, private yachts. They are large boats, carrying more than 3,000 passengers each, making five trips a day and transporting approximately 500,000 passengers during each of the summer seasons of 1944 and 1945 (R. 6-7). Nor is appellant's business confined to a selected clientele; it advertises in the Detroit newspapers and on its street cars for passengers generally.

In short, this public conveyance is a large enterprise, holding itself out generally for public patronage, except that it refuses to carry Negroes.

It is submitted that by extending the common law duty of full and equal service to such public conveyances engaged in foreign commerce, Michigan has not imposed on the appellant an obligation which subjects commerce to an undue burden.

D. The Michigan statute presents no danger of conflicting State regulation of commerce since the Equal Protection Clause of the Fourteenth Amendment precludes statutes requiring discrimination.

The constitutional purpose behind the condemnation of State regulation of interstate or foreign commerce, where Congress has not acted, is the necessity of avoiding diverse or conflicting regulation which would unduly impede commerce. In the language of this Court in *County of Mobile* v. *Kimball* (102 U. S. 691, 697 [1880]):

> There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation.

See, also, *California* v. *Thompson*, 313 U. S. 930, 934 (1941).

We submit that the requirement of the Michigan statute, that full and equal accommodations and facilities be provided to all citizens, regardless of race or color, imposes no undue burden on interstate or foreign commerce, because any statute requiring or authorizing anything less would be unconstitutional as violative of the Equal Protection of the Laws Clause of the Fourteenth Amend-

ment. That clause provides that "no state shall • • • deny to any person within its jurisdiction the equal protection of the laws."

Under the decisions of this Court, no State has the constitutional power to enact legislation requiring the appellant to discriminate against Negroes by refusing them passage on its vessels or by denying to them accommodations, privileges or facilities granted to white persons (*McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.*, 235 U. S. 151 [1914]; *Mitchell* v. *United States*, 313 U. S. 80 [1941]; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 [1938]).

In the *Mitchell* case, *supra*, the Court declared:

> The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment (313 U. S. at p. 93).

The vice which has invalidated State regulations of interstate or foreign commerce, namely, that if the regulations were sustained, other States could, with equal right, impose conflicting and diverse regulations which would burden commerce, is, therefore, not present in the instant case. The Constitution itself, through the Equal Protection Clause, insures against a State requirement of discrimination on account of race or color in furnishing facilities or accommodations. The Michigan requirement of full and equal accommodations to all citizens alike carries out the constitutional "pledge of the protection of equal laws" (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 359 [1886]; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 350 [1938]); it cannot, therefore, be regarded as imposing an undue burden on foreign commerce.

Our contention that State regulation of interstate commerce may be held to be free of burdensome effects, in view of the restrictive effects of other provisions of the Constitution, is not new. The interplay between the Com-

merce Clause and the Fourteenth Amendment has been an important factor in sustaining State regulation of interstate commerce in the area of taxation (*McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 [1940]; *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340 [1944]).

In determining whether the validation of a State tax would subject interstate commerce to a risk of undue cumulative tax burdens, the Court has considered the effect of the Due Process Clause in restricting the taxing powers of other States. A basic consideration in the sustaining of certain State tax levies affecting interstate commerce has been the inability of other States to tax the same transaction, not because of the Commerce Clause, but because of the restrictions on extraterritorial taxation imposed on the States by the Due Process Clause.

Mr. Justice Rutledge has illumined this interrelation between the Commerce Clause and the Due Process Clause in two recent opinions (*International Harvester Co.* v. *Department of Treasury et al., supra;* and *Freeman* v. *Hewit*, 329 U. S. 249 [1946]). In the latter case Mr. Justice Rutledge said (at p. 271):

> Selection of a local incident for pegging the tax has two functions relevant to determination of its validity. One is to make plain that the state has sufficient factual connections with the transaction to comply with due process requirements. *The other is to act as a safeguard, to some extent, against repetition of the same or a similar tax by another state.* (Our emphasis; footnote omitted.)

See also McNamara, *Jurisdictional and Commerce Problems*, 8 Law and Contemporary Problems 482 (1941).

The principle applied in the tax cases affecting interstate commerce is, we believe, applicable to the instant case. In the cases referred to, the Due Process Clause made it impossible for other States to add to the burden of the tax on the transaction under attack, with the result that the levies were sustained. So, here, the Equal Protection Clause precludes diverse or conflicting State action respecting equal accommodations and facilities. Consequently,

as in the tax cases, the regulation is valid, for in the absence of the risk of an undue burden on commerce, the statute is a proper exercise of the State's police power.

E. The cases invalidating State legislation forbidding or requiring the segregation of Negroes and white passengers are inapplicable to the present case, which involves a total denial of accommodations on account of race or color.

This is not a segregation case; it is a case of the denial of all accommodations and facilities because of race or color. For that reason, the cases of *Hall* v. *De Cuir* (95 U. S. 485 [1877]) and *Morgan* v. *Commonwealth of Virginia* (328 U. S. 373 [1946]), relied on by the appellant, are inapplicable. Those cases dealt with the issue as to whether a State could require in the one case and prohibit in the other the segregation of Negroes and white persons on interstate carriers.

The basis for those decisions was that if statutes of the type there involved were upheld, interstate carriers might be subjected to diverse regulation which would make necessary the shifting of passengers as the carrier moves from State to State. The burden which might be imposed by such divergent requirements was determined to be a sufficient impediment to commerce to require invalidation of the statutes. Nothing in the cases gives substance to the contention that the extension to public conveyances of the common law duty of common carriers to serve all comers, irrespective of race or color, would create an undue burden on commerce.

The statute here, as we have shown, cannot be attacked because of the danger of divergent regulation. There is nothing to prevent appellant from admitting all races and creeds on an equal basis and maintaining that basis in all its operations. On the other hand, nothing can be found in the *Hall* or *Morgan* cases which supports the view that the regulation, by itself and without regard to the possible actions of other States, places an undue burden upon commerce. We cannot believe that this Court will hold that a requirement that a public carrier refrain from

selecting its passengers on a racial basis is a burden on the commerce which the federal government is empowered to protect.

CONCLUSION

In prohibiting public conveyances from discriminating against Negroes in furnishing accommodations, Michigan, along with 17 other States, has carried out a policy of equality which is written into the Federal Constitution. The statute is in keeping with Federal legislation dealing with common carriers and is in line with the best American tradition. Unless the Michigan statute collides with a paramount Federal interest in permitting the States to require anything less than equal facilities for persons of all races and colors, the enactment is not in conflict with the Foreign Commerce Clause.

We would be shocked to learn that the commerce power is a shield protecting public conveyances against State interdiction of discrimination against Negroes. The entire judicial history of the commerce power negates this view. We submit that the Michigan statute as applied to the appellant is constitutional.

Respectfully submitted,

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December 12, 1947.

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Supreme Court of the United States

October Term, 1947

No. 374

BOB-LO EXCURSION COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Appellee.

APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION AND BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AMERICAN CIVIL LIBERTIES UNION, AND NATIONAL LAWYERS GUILD AS *AMICI CURIAE*.

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Supreme Court of the United States

October Term, 1947

No. 374

BOB-LO EXCURSION COMPANY,

Appellant,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Appellee.

APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION AND BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AMERICAN CIVIL LIBERTIES UNION, AND NATIONAL LAWYERS GUILD AS *AMICI CURIAE*.

Motion for Leave to File Brief as *Amici Curiae*.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for and on behalf of the National Association for the Advancement of Colored People, the American Civil Liberties Union, and the National Lawyers Guild, respectfully move that this Honorable Court grant them leave to file the accompanying brief as *amici curiae*.

Consent of the attorney for the appellant and the attorney for the appellee to the filing of this brief has been obtained.

Special reasons in support of this motion are set forth in the accompanying brief.

THURGOOD MARSHALL,
OSMOND FRAENKEL,
O. JOHN ROGGE,
Counsel for Amici Curiae.

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BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AMERICAN CIVIL LIBERTIES UNION, AND NATIONAL LAWYERS GUILD AS *AMICI CURIAE*.

Opinions Below.

Statute Involved.

The opinion below and the statute involved are set forth in full in the record and in the briefs for both parties filed herein.

Question Presented.

The Specification of Errors urged by appellant is summarized by it as follows: "The questions here presented to

the Court are in reality but one, viz: the Michigan Civil Rights Statute is either unconstitutional as violating the commerce clause of the Federal Constitution, or at least may not constitutionally be applied to defendant when engaged in its foreign commerce business.''[1]

Constitutional Provision and Statute Involved.

The United States Constitution Article I, section 8, (3) provides: "Congress shall have power . . . (3) to regulate commerce with foreign Nations, and among the several states . . ."

The Michigan Civil Rights Statute provides:

> "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, restaurants, eating houses, barbershops, billiard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, where refreshments are or may hereafter be served, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices'' (Act No. 117, Pub. Acts 1937; Stat. Ann. 1946, Cum. Supp. Sec. 28.343).

Statement of the Case.

The appellant herein is a private corporation for profit organized "to lease, own and operate amusement parks in Canada and to charter, lease, own and operate excursion steamers and ferry boats in interstate and foreign commerce, together with dock and terminal facilities pertaining thereto . . . " (R. 5).

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[1] Appellant's brief, page 4.

In June, 1945, its agents compelled a Negro, the complaining witness, to disembark from one of its ships while at the wharf in Detroit and denied her accommodations on its ship solely because of her race or color. It is admitted that the refusal to carry the complaining witness as a passenger was pursuant to an established policy of the appellant not to permit Negroes to be passengers on its boats (R. 10, 11).

The trip in question was one of the usual trips made by appellant's steamers from Detroit to Bob-Lo Island in Canadian waters. During the trip the boats are part of the time in Canadian waters and part of the time in United States waters. Appellant does not carry any passengers from Canada to the island but carries only passengers from Michigan to the island on round-trip tickets.

Because of the refusal to carry the complaining witness as a passenger on one of its steamers solely because of her race or color, appellant was prosecuted and convicted under the Michigan Civil Rights Statute. The conviction was affirmed by the Supreme Court of Michigan and on appeal to this Court probable jurisdiction was noted.

ARGUMENT.

I.

Analysis of appellant's claim of unconstitutionality.

The argument of appellant is divided into two points (a) appellant is engaged in foreign commerce; (b) the Michigan Civil Rights Statute involved may not constitutionally be applied to appellant when engaged in such foreign commerce on account of the commerce clause of the Federal Constitution.

The Supreme Court of Michigan held that appellant in the instant case was engaged in foreign commerce (R. 39). The real contention of appellant is that since it is engaged in "foreign commerce" it is subject only to possible regulation by Congressional action and that in the absence of Congressional action regulating them it is free to exclude passengers solely because of race or color. Of course, the technical position of the appellant is that for the above reasons it is not subject to liability under the Michigan Civil Rights Statute.

The appellant relies almost entirely upon the decisions of this Court in *Hall* v. *DeCuir* [2] and *Morgan* v. *Virginia*.[3]

II.

The Michigan Civil Rights Statute may constitutionally be applied to the appellant herein.

It is the contention of the appellant that in the absence of specific federal legislation the question of the selection of passengers is left to the unrestrained will of appellant. The position of appellant on this point is in direct opposition to a long line of decisions of this Court which affirm the doctrine set forth in the case of *Cooley* v. *Port Wardens, et al.*, 12 How. 299, that the granting to Congress of the power to regulate interstate and foreign commerce did not of itself deprive the states from exercising authority over this subject matter.

Where a state statute is challenged as violating the commerce clause each case must be considered on its own facts with this Court as the final arbiter as to whether the

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[2] 95 U. S. 485.
[3] 328 U. S. 373.

particular statute violates the commerce clause.[4] In the absence of an affirmative showing of a burden on interstate or foreign commerce there can not be a violation of the commerce clause. Where the facts of the particular case establish a "burden" on interstate or foreign commerce, this Court must then weigh the interests of the state and the national interests.[5]

It is the policy of appellant of excluding all Negroes from its ships which obstructs the free flow of passengers in commerce. On the other hand, the Michigan statute prohibiting such a policy is an aid to the free flow of commerce.

In the instant case the interest of the State of Michigan in enforcing its civil rights statute is in furtherance of the purpose of the national interests. The purpose of the Michigan Civil Rights Act is to prohibit individuals and corporations carrying on businesses of public accommodation therein mentioned from doing what the state is prohibited from doing under the Fourteenth Amendment to the Constitution.[6]

The appellant herein relies on *Hall* v. *DeCuir* and *Morgan* v. *Virginia*, and insists that on the basis of these two cases this court must hold that the Michigan Civil

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[4] *Southern Pacific* v. *Arizona*, 325 U. S. 761; *Morgan* v. *Virginia*, 328 U. S. 373; see also Dowling, *Interstate Commerce and State Power—Revised Version*, 47 Col. Law Rev. 547 (1947).

[5] *Ibid.*

[6] The Michigan Civil Rights Act, originally enacted in 1885, is designed to implement the Fourteenth Amendment in areas where the *Civil Rights Cases*, 109 U. S. 3, specifically held the federal government could not act. Thus the acts of appellants prohibited by the Michigan act are those of which this Court stated individuals "must be amenable therefor to the laws of the state where the wrongful acts are committed," at p. 17.

Rights Statute involved in this case cannot constitutionally be applied to it.

In the case of *Hall* v. *DeCuir*, the Louisiana statute prohibited segregation on common carriers because of race, but this court found that the statute violated the commerce clause because the carrier operated between Louisiana and Mississippi, which latter state might subsequently adopt a regulatory statute differing from the one in Louisiana. However, since the decision in *Hall* v. *DeCuir*, this court has consistently followed the rule that each case must be considered on its own facts and that state statutes regulating commerce will only be declared unconstitutional as in violation of the commerce clause where the facts in the particular case clearly demonstrate the existence of a burden on interstate or foreign commerce and that the burden is inconsistent with national interests.

In the case of *Morgan* v. *Virginia*, this Court made an independent examination of the effect of the statute to determine whether it unduly burdened commerce. The statute requiring the segregation on motor carriers and requiring the driver of the vehicle to shift passengers according to race was compared with the varying types of statutes in existence in states bordering Virginia, as well as other states in which the carrier operated. This Court also examined the statutes of those states which also made varying definitions of the word "Negro." After considering these factors this Court found that the Virginia statute did place an unreasonable burden on interstate commerce. On the other hand, in the instant case the Michigan statute removes

all possible burdens of this type by prohibiting segregation. and such a statute is clearly not a burden on commerce but an aid to the free flow of commerce.

If a state statute which requires a carrier to provide its passengers with separate accommodations according to their race and color is void as applied to interstate carriers because it puts an unconstitutional burden on them, to say that a state statute which in effect prohibits such a burden is likewise a burden on interstate commerce is clearly a *non sequitur*.

This Court has always fully protected goods moving in interstate commerce from discriminatory regulations by carriers and states. There is a higher national interest involved in protecting the "right of persons to move freely from state to state" than is present in cases concerning the movement of goods.[7]

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[7] See concurring opinions in *Edwards* v. *California*, 314 U. S. 160. In upholding a section of the New York Civil Rights Act, Mr. Justice REED, speaking for the majority of the court, stated, "We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees". *Railway Mail Association* v. *Corsi*, 326 U. S. 88, 94. And in a concurring opinion in the same case, Mr. Justice FRANKFURTER stated, "Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the Constitution itself exacts;" Ibid. at page 98.

In determining the relative weights of state and national interests as to "state safety regulations" of interstate carriers, this Court has followed its rule of considering each case on its own merits and has thereby upheld such regulatory statutes as those involved in the full train crew laws while declaring invalid state laws limiting the number of cars on railroad trains.

On the question as to who shall be transported in interstate commerce and the manner in which passengers shall be transported, there is also a recognizable difference in the type of statute involved in the *Morgan* case and the type of statute involved in this case. The national interests involved in the method of handling passenger traffic are twofold: (1) there is the over-all national interest of free flow of commerce, and (2) there is the national interest that no distinction because of race, color or national origin shall be permitted in areas subject to national control.

Despite the absence of a requirement for equal protection of the laws in the Fifth Amendment, our national government is prohibited from making distinctions on the basis of race and color since such distinctions are considered arbitrary and inconsistent with the requirements of due process except where national safety and the perils of war render such measures necessary.[8]

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[8] *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214; *Ex parte Endo*, 323 U. S. 283; and see also: *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210.

The State of Michigan may in the absence of federal legislation remove obstacles to the free flow of interstate and foreign commerce.

By delegating to the federal government the power to regulate interstate and foreign commerce, the several states intended to keep the channels of commerce "open and free from obstruction . . . imposed by the state or otherwise."[9] It was not intended, and such delegation has never been construed by this Court, to remove from the states all power to act in relation to interstate commerce, but rather to give the federal government the power "to remove such obstructions when they exist and to provide . . . against occurrence of the evil and the punishment of offenders."[10]

That the states may improve navigable waters by the erection of docks and the removal of obstructions to commerce is unquestioned. Thus, in *Monongahela Navigation Co.* v. *U. S.*,[11] this Court said of the action taken under state authority to build locks improving the river that "The legislature of the state creating this corporation . . . has come in aid of Congress."[12]

Similarly, in *Sands* v. *Manistee River Improvement Company*,[13] this Court found that a state statute organizing a corporation and authorizing it to collect tolls for the cutting of channels and removal of obstructions in a navigable river did not conflict with the power of Congress to regulate such waters in the absence of Congressional action. The Court reiterated the principle that the constitutional pro-

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[9] *Gilman* v. *Philadelphia*, 3 Wall, 713, 725.
[10] *Id.*
[11] 148 U. S. 312.
[12] *Ibid.*, 334. See also *Wisconsin* v. *Duluth*, 96 U. S. 379.
[13] 123 U. S. 288.

visions "did not contemplate that such navigation might not be improved by the removal of obstructions."[14]

The free flow of commerce, which the federal government has an interest to maintain and a right to regulate, can be hampered as well by the discriminatory refusal of a carrier to transport as by physical obstructions. Since the states may, in the absence of federal action, enact laws and authorize the erection of docks, dams, locks and other physical improvements, and may remove obstructions in the form of adverse currents, shallow channels, log jams, etc., in aid of interstate and foreign commerce, the state may likewise act "in aid of Congress" to remove the obstruction to commerce caused by appellant's absolute refusal to transport Negroes.

The simple fact is that only by compliance with the Michigan Civil Rights Act can commerce be freed; only in securing compliance with this or a similar statute can commerce be increased by the transportation of additional classes of persons, and all this will be done in furtherance of commerce, rather than in obstruction of it.

The appellant placed much emphasis upon the "foreign" or "international" nature of their enterprise to substantiate their claim of exemption from the anti-discrimination provisions of the Michigan Civil Rights Act. Quite the opposite result flows, however, from the international aspects of this case from that desired by the company. In the first place, the province of Ontario has had an anti-discrimination law since 1944[15] forbidding publication of discriminatory advertisements, notices, symbols or emblems, and in 1945 an Ontario court held that the participation of Canada

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[14] *Ibid.*

[15] Racial Discrimination Act, Session Laws 1944, Chap. 51.

in the United Nations had unalterably fixed the public policy of Ontario and the Dominion in opposition to racial discrimination [16]. The requirements of the Michigan Civil Rights Act are, therefore, in conformity with the provisions of Ontario statutes and common law and no burden is placed upon the appellant by the requirement that it not discriminate against prospective passengers.

Furthermore, all that appellant is asked to do under the Michigan Civil Rights Act is to cooperate in carrying out the obligations of this country under the United Nations Charter of which both the United States and the Dominion of Canada are signatories. Thus, Articles 55 and 56 of the United Nations Charter provide that each member of the United Nations shall take joint and separate action to promote "universal respect for and performance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.".

In view of the decision of this Court defining the nature of burdens upon commeree, under the facts in this case, no burden is imposed. Thus, it cannot be said that the provisions of state law forbidding discrimination "impair the usefulness of [the] facilities" [17] of a carrier which passes between two ports only, each of which is in a country pledged by the United Nations Charter to oppose racial discrimination. Furthermore, it cannot be said that the anti-discrimination provision in any way "infringes the requirements of national uniformity" [18] of the United States, in the light of the provisions of the United Nations Charter.

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[16] *In re Drummond Wren*, 4 D. L. R. (1945) 674.
[17] *Illinois Central R. Co.* v. *Illinois*, 163 U. S. 142, 154.
[18] *Morgan* v. *Virginia*, 328 U. S. 373, 385.

Conclusion.

This Court in the light of its recent decisions should determine that the Michigan Civil Rights Act far from being unconstitutional (1) is in fact an aid to the free flow of commerce; and, (2) is in keeping with the national interest not to discriminate because of race, creed or national origin. Thus segregation statutes similar to the one involved in the *Morgan* case are unconstitutional while statutes similar to the Michigan one are valid.

It is therefore respectfully submitted that the appeal should be dismissed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 374.—October Term, 1947.

Bob-Lo Excursion Company, Appellant, v. The People of the State of Michigan.	Appeal from the Supreme Court of the State of Michigan.

[February 2, 1948.]

Mr. Justice Rutledge delivered the opinion of the Court.

Bois Blanc Island is part of the Province of Ontario, Canada. It lies just above the mouth of the Detroit River, some fifteen miles from Michigan's metropolis upstream. The island, known in Detroit by the corruption "Bob-Lo," has been characterized as that city's Coney Island.

Appellant owns almost all of Bois Blanc in fee.[1] For many years it has operated the island, during the summer seasons, as a place of diverse amusements for Detroit's varied population. Appellant also owns and operates two steamships for transporting its patrons of the island's attractions from Detroit to Bois Blanc and return. The vessels engage in no other business on these trips.[2] No

[1] A small fenced-off tract at one end is reserved for lighthouse purposes, and three small cottage lots. Appellant is a Michigan corporation, authorized by its charter to "lease, own and operate amusement parks in Canada, and to charter, lease, own and operate excursion steamers and ferry boats in interstate and foreign commerce, together with dock and terminal facilities pertaining thereto," as well as to acquire, own, use and dispose of real and personal property "as may be necessary or convenient in connection with the aforesaid business of the company."

[2] The record shows that at times during the season appellant uses these ships to provide excursion trips for residents of the Province of Ontario, but these excursions are kept entirely separate from those between Detroit and Bois Blanc and we are concerned with no question relating to them.

freight, mail or express is carried; the only passengers are the patrons bent on pleasure, who board ship at Detroit; they go on round-trip one-day limit [3] tickets which include the privilege of landing at Bois Blanc and going back by a later boat.[4] No intermediate stops are made on these excursions.

In conducting this business of amusement and transportation, appellant long has followed the policy, by advertisement and otherwise, to invite and encourage all comers, except two classes. One is the disorderly; the other, colored people.[5] From the latter exclusion this case arises.

In June of 1945 Sarah Elizabeth Ray, the complaining witness, was employed by the Detroit Ordnance District. She and some forty other girls were also members of a class conducted at the Commerce High School under the auspices of the ordnance district. The class planned an excursion to Bois Blanc for June 21 under the district's sponsorship.

On that morning thirteen girls with their teacher appeared at appellant's dock in Detroit to go on the outing.

[3] Apparently no facilities are provided at the island for overnight guests.

[4] The company fixes its own rates. The usual round-trip charge is 85¢, except for Saturday nights and Sundays when a higher rate applies. Special excursions at times are arranged for churches, Sunday schools, clubs, lodges, etc., for which the regular charge is paid by the passenger but the company allows the organization a discount which permits it to make a profit. The discounts are not uniform.

[5] Appellant's assistant general manager, Devereaux, testified: "The defendant adopted the policy of excluding so-called 'Zoot-suiters,' the rowdyish, the rough and the boisterous and it also adopted the policy of excluding colored."

Appellant printed on the back of each ticket: "Right reserved to reject this ticket by refunding the purchase price." The record contains no evidence of any exclusion or policy of exclusion of others than disorderly or colored persons.

All were white except Miss Ray. Each girl paid eighty-five cents to one of the group, who purchased round-trip tickets and distributed them. The party then passed through the gate, each member giving in her ticket without question from the ticket taker. They then checked their coats, went to the upper decks and took chairs.

Shortly afterward Devereaux, appellant's assistant general manager, and a steward named Fox appeared and stated that Miss Ray could not go along because she was colored. At first she remonstrated against the discrimination and refused to leave. But when it appeared she would be ejected forcibly, she said she would go. Devereaux and Fox then escorted her ashore, saying the company was a private concern and could exclude her if it wished. They took her to the ticket office and offered to return her fare. She refused to accept it, took their names, and left the company's premises. There is no suggestion that she or any member of her party was guilty of unbecoming conduct. Nor is there any dispute concerning the facts.

This criminal prosecution followed in the Recorder's Court for Detroit, for violation of the Michigan civil rights act[6] in the discrimination practiced against Miss Ray. Jury trial being formally waived, the court after hearing evidence and argument found appellant guilty as charged and sentenced it to pay a fine of $25.[7] On appeal the Supreme Court of Michigan affirmed the judgment,

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[6] Mich. Penal Code §§ 146–148, as amended by Act No. 117, Mich. Pub. Acts 1937; Mich. Comp. Laws (Supp. 1940) §§ 17115–146 to 17115–148; Mich. Stat. Ann. (1946 Cum. Supp.) §§ 28.343–28.346. These sections of the Penal Code reenacted and broadened the application of Act No. 130, Mich. Pub. Acts 1885. See notes 8 and 10.

[7] Appellant's motion for "directed" verdict of not guilty was denied, as was also its motion after judgment for a new trial. The trial court filed a written opinion which is unreported.

holding the statute applicable to the circumstances presented by the case and valid in that application, as against the constitutional and other objections put forward. 317 Mich. 686. In due course probable jurisdiction was noted here. Judicial Code § 237 (a).

The Michigan civil rights act, § 146, enacts:

> "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, restaurants, eating houses, barber shops, billiard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, where refreshments are or may hereafter be served, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices." [a]

By § 147, any owner, lessee, proprietor, agent or employee of any such place who directly or indirectly withholds any accommodation secured by § 146, on account of race, creed or color, becomes guilty of a misdemeanor, punishable as the section states, and liable to a civil action for treble damages.[b]

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[a] The appropriate statutory citations are set forth in note 6.

[b] Section 147 is as follows: "Any person being an owner, lessee, proprietor, manager, superintendent, agent or employe of any such place who shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities and privileges thereof or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communications, notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any such places shall be refused, withheld from or denied to any person on account of race, creed or color or that any particular race, creed or color is not welcome,

The Michigan statute is one of the familiar type enacted by many states before and after this Court's invalidation of Congress' similar legislation in the *Civil Rights Cases*, 109 U. S. 3.[10] The Michigan Supreme Court held the statute applicable to appellant's business over its objection that as a matter of local law it is not a "public conveyance" within the meaning of § 146.[11] We

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objectionable or not acceptable, not desired or solicited, shall for every such offense be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars or imprisoned for not less than fifteen days or both such fine and imprisonment in the discretion of the court; and every person being an owner, lessee, proprietor, manager, superintendent, agent or employe of any such place, and who violates any of the provisions of this section, shall be liable to the injured party, in treble damages sustained, to be recovered in a civil action: Provided, however, That any right of action under this section shall be unassignable."

No suggestion is made that the phrase "on account of race, creed or color" does not apply to the withholding and denying provisions of the section as well as those relating to publishing, etc., the notices or advertisements specified.

Section 148 of the Act forbids discrimination because of race, creed or color in selecting grand and petit jurors.

[10] These cases were decided in 1883. The Michigan statute was enacted originally in 1885. Seventeen other states have similar, and in many instances substantially identical, legislation. The statutory citations are given in *Morgan* v. *Virginia*, 328 U. S. 373, 382, n. 24.

[11] Appellant urged that it was not a common carrier, a public utility, or a "public conveyance" within the specific terms of § 146. The state supreme court said: "There is no escape from the conclusion that defendant herein is engaged in the business of operating 'public conveyances' by water, and the Michigan statute provides: 'All persons within the jurisdiction of this State shall be entitled to full and equal accommodations' afforded by such conveyances. The Michigan enactment has been held constitutional. *Bolden* v. *Grand Rapids Operating Corp.*, 239 Mich. 318 (53 A. L. R. 183). Our conclusion is . . . that the Michigan civil rights act . . . is applicable to the business carried on by defendant . . . ." 317 Mich. 686, 695.

The court distinguished *Meisner* v. *Detroit, Belle Isle & Windsor Ferry Co.*, 154 Mich. 545, in which appellant's corporate predecessor

accept this conclusion of the state court as a matter of course. That court also impliedly rejected appellant's constitutional objections based upon alleged denial of due process of law and equal protection of the laws under the Fourteenth Amendment, issues now eliminated from the case.[12]

We have therefore only to consider the single and narrow question whether the state courts correctly held that the commerce clause, Art. I, § 8, of the Federal Constitution does not forbid applying the Michigan civil rights act to sustain appellant's conviction. We agree with their determination.

There can be no doubt that appellant's transportation of its patrons is foreign commerce within the scope of Art. I, § 8.[13] *Lord* v. *Goodall Steamship Co.*, 102 U. S. 541; cf. *Edwards* v. *California*, 314 U. S. 160. Appellant's

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was held not liable in tort for breach of an alleged duty as a common carrier of passengers, by pointing out that no right apparently had been asserted in that case grounded on the state civil rights act. 317 Mich. 686, 696.

[12] The jurisdictional statement sought review of these Fourteenth Amendment questions, as well as the commerce clause issue. But appellant's reply brief states: "The cause before us is a business case arising under the Michigan Civil Rights Act and the Commerce Clause; *not* one arising under the [federal] Civil Rights Act and the 14th Amendment." And we were given to understand at the oral argument, in response to specific inquiry, that the only issue on which decision was sought as of that time was the commerce clause question.

The Michigan Supreme Court did not refer explicitly in its opinion to appellant's Fourteenth Amendment contentions, but the record shows they were presented to that court in the assignments of error on appeal and were therefore necessarily rejected by its affirmance of the judgment of the Recorder's Court.

[13] Until the case reached this Court, apparently, the state had maintained that foreign commerce was not involved and the trial court so held, although the ruling was hedged with the further one that, if it was erroneous, still the state's power to apply the civil right's act was not nullified by the commerce clause.

vessels sail to and from a port or place in foreign territory wholly under another nation's sovereignty. They cross the international boundary, which is the thread of the Detroit River, several times in the course of each short trip. Appellant necessarily complies with federal regulations applicable to foreign commerce, including those governing customs, immigration and navigation matters. It likewise satisfies similar regulations of the Canadian authorities.[14]

Of course we must be watchful of state intrusion into intercourse between this country and one of its neighbors. But if any segment of foreign commerce can be said to have a special local interest, apart from the necessity of safeguarding the federal interest in such matters as immigration, customs and navigation, the transportation of appellant's patrons falls in that characterization. It would be hard to find a substantial business touching foreign soil of more highly local concern. Except for the small fenced-off portion reserved for the lighthouse and three cottage sites,[15] the island is economically and socially, though not politically, an amusement adjunct of the city of Detroit. Not only customs and immigrations regulations of both countries, but physical barriers prevent intercourse, both commercial and social, between Canadians and appellant's patrons, except as the former

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[14] *E. g.*, on arrival at Bois Blanc all passengers who land pass through Canadian customs and immigration inspection. Prior to the late war, on returning to Detroit, similar inspections were made by United States authorities. During the war the latter inspection was suspended, appellant filing a bond to indemnify the Treasury against loss of revenue and expenses arising from any free importation of dutiable goods from Bois Blanc or Canada and an agreement with the Immigration Service not to bring in aliens ineligible for entry.

[15] It does not appear whether these sites are inhabited, but presumably a keeper of the lighthouse occupies some part of the reserved premises.

may come first by other means to Detroit, then go to the island from American soil on appellant's vessels, and return from the holiday by the same roundabout route.

The record indicates there are no established means of access from the Canadian shore to the island. There is no evidence of even surreptitious entry from the Canadian mainland. Appellant's vessels not only are the sole means of transportation to and from the island, but carry only its own patrons of Bois Blanc's recreational facilities. These travel exclusively on round-trip tickets for passage beginning and ending on American soil. They are principally residents of Detroit and vicinity. All go aboard there and return the same day. None go from the island to the Canadian bank of the river. The only business conducted at the island is the operation of appellant's recreational and accessory facilities, which apparently do not include provision for overnight guests. No other persons than appellant's patrons come to the island, or have a right to come, from Canada's mainland or elsewhere, or go from the island to Detroit.

The sum of these facts makes Bois Blanc an island in more than the geographic sense. They insulate it and appellant's business done in connection with it from all commercial or social intercourse and traffic with the people of another country usually characteristic of foreign commerce, in short from the normal flow and incidents of such commerce. Since the enterprise is conducted in this highly closed and localized manner with Canada's full consent, no detraction whatever from that friendly neighbor's sovereignty is implied by saying that the business itself is economically and socially an island of local Detroit business, although so largely carried on in Canadian waters. As now conducted, apart from presently applicable Canadian and federal regulations and until Canada or Congress or both countries by treaty see fit to add others, the business is of greater concern to

Detroit and the State of Michigan than to Dominion or Ontario interests or to those of the United States in regulating our foreign commerce.

The regulation in this application contains nothing out of harmony, much less inconsistent with our federal policy in the regulation of commerce between the two countries nor, so far as we are advised, with Canadian law and policy.[16] Appellant urges, however, that Canada might adopt regulations in conflict with Michigan's civil rights act, thus placing it in an inescapable dilemma if that act may be applied to its operations. Conceding the possibility, we think the state is right in viewing it as so remote that it is hardly more than conceivable. The same thing, we think, is true of the possibility that Congress might take conflicting action.

If therefore in any case a state may regulate foreign commerce; the facts here would seem clearly to justify Michigan's application of her civil rights act. It is far too late to maintain that the states possess no regulatory powers over such commerce. From the first meeting of Congress they have regulated important phases of both foreign and interstate commerce, particularly in relation

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[16] The Province of Ontario enacted in 1944 its Racial Discrimination Act, Session Laws 1944, c. 51.

Federal legislation has indicated a national policy against racial discrimination in the requirement, not urged here to be specifically applicable in this case, of the Interstate Commerce Act that carriers subject to its provisions provide equal facilities for all passengers, 49 U. S. C. § 3 (1), extended to carriers by water and air, 46 U. S. C. § 815; 49 U. S. C. §§ 484, 905. Cf. *Mitchell* v. *United States*, 313 U. S. 80. Federal legislation also compels a collective bargaining agent to represent all employees in the bargaining unit without discrimination because of race. 45 U. S. C. §§ 151 *et seq.* *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210. The direction of national policy is clearly in accord with Michigan policy. Cf. also *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214; *Ex parte Endo*, 323 U. S. 283.

to transportation by water, with Congress' express consent.[17] And without such consent for nearly a hundred years they have exercised like power under the local diversity branch of the formula announced in *Cooley* v. *Board of Wardens*, 12 How. 299.[18] See *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202; *Kelly* v. *Washington*, 302 U. S. 1 and authorities cited in both cases. Indeed the *Cooley* criterion has been applied so frequently in cases concerning only commerce among the several states that it is often forgotten that that historic decision dealt indiscriminately with such commerce and foreign commerce.[19]

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[17] It is hardly necessary to recall again that by the Act of August 7, 1789, the First Congress declared that pilotage in bays, inlets, rivers, harbors and ports of the United States should continue to be regulated in conformity with existing state laws or others thereafter enacted until further action by Congress. 1 Stat. 54. Congress on occasion has modified such state legislation, *e. g.*, by the Act of March 2, 1837, 5 Stat. 153, making it lawful for vessels navigating waters constituting the boundary between two states to take on pilots qualified under the laws of either.

[18] In *Olsen* v. *Smith*, 195 U. S. 332, the Court sustained a Texas statute regulating pilotage of a British vessel coming from a foreign port. The contention that the state was without power to legislate in this field was disposed of in one sentence. "The unsoundness of this contention is demonstrated by the previous decisions of this court, since it has long since been settled that even although state laws concerning pilotage are regulations of commerce, 'they fall within that class of powers which may be exercised by the states until Congress has seen fit to act upon the subject.' [citing the *Cooley* and other cases]." 195 U. S. 341. Other cases upholding state regulation of foreign commerce are to the same effect: *Pacific Mail Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Wilson* v. *McNamee*, 102 U. S. 572; *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187. Cf. *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, and cases cited; *Pigeon River Co.* v. *Cox Co.*, 291 U. S. 138, 158–159.

[19] The Court's opinion in that case deals expressly but indiscriminately with both types of commerce. And from the record and arguments of counsel it seems clear that both were actually involved. There were two cases relating to two different vessels, the Consul,

Appellant hardly suggests that the power of Congress over foreign commerce excludes all regulation by the states. But it verges on that view in regarding *Hall* v. *DeCuir*, 95 U. S. 485, supplemented by *Morgan* v. *Virginia*, 328 U. S. 373, and *Pryce* v. *Swedish-American Lines*, 30 F. Supp. 371, as flatly controlling this case. We need only say that no one of those decisions is comparable in its facts, whether in the degree of localization of the commerce involved; in the attenuating effects, if any, upon the commerce with foreign nations and among the several states likely to be produced by applying the state regulation; or in any actual probability of conflicting regulations by different sovereignties. None involved so completely and locally insulated a segment of foreign or interstate commerce.[20] In none was the business affected merely an adjunct of a single locality or community as is the business here so largely. And in none was a complete exclusion from passage made. The *Pryce* case, of course, is not authority in this Court, and we express no opinion on the problem it presented. The regulation of traffic along the Mississippi River, such as the *Hall* case comprehended,

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which was engaged in coastwise trade between Philadelphia and New York, and the Undine, which appears to have been engaged exclusively in foreign commerce. The destination, whether foreign or domestic, of the Undine is not shown by the record, which merely states that it sailed "from the port of Philadelphia to a certain port not within the river. Delaware . . . ." But from the specific "addition" by counsel for argumentative purposes, 12 How. at 302–303, of the facts that the Consul held a federal coasting license and was bound from one domestic port to another, plus the omission of any reference in argument or in the record to a similar license for the Undine (when such a reference would have supported the additional argument), the inference seems justified that the Undine had sailed for a foreign port. Moreover counsel argued that both ships were engaged in foreign commerce, although only the Consul was engaged in coastwise trading.

[20] Cf. *Port Richmond Ferry* v. *Hudson County*, 234 U. S. 317, 331–332.

and of interstate motor carriage of passengers by common carriers like that in the *Morgan* case, are not factually comparable to this regulation of appellant's highly localized business, and those decisions are not relevant here.

It is difficult to imagine what national interest or policy, whether of securing uniformity in regulating commerce, affecting relations with foreign nations, or otherwise, could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so. Certainly there is no national interest which overrides the interest of Michigan to forbid the type of discrimination practiced here. And, in view of these facts, the ruling would be strange indeed, to come from this Court, that Michigan could not apply her long-settled policy against racial and creedal discrimination to this segment of foreign commerce, so peculiarly and almost exclusively affecting her people and institutions.

The Supreme Court of Michigan concluded "that holding the provisions of the Michigan statute effective and applicable in the instant case results only in this, defendant will be required in operating its ships as 'public conveyances' to accept as passengers persons of the negro race indiscriminately with others. Our review of this record does not disclose that such a requirement will impose any undue burden on defendant in its business in foreign commerce." 317 Mich. 686, 694. Those conclusions were right.

The judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 374.—October Term, 1947.

Bob-Lo Excursion Company, Appellant, v. The People of the State of Michigan.	Appeal from the Supreme Court of the State of Michigan.

[February 2, 1948.]

Mr. Justice Douglas, concurring.

The case is, I think, controlled by a principle which cuts deeper than that announced by the Court and which is so important that it deserves to be stated separately.

Hall v. *De Cuir*, 95 U. S. 485, and *Morgan* v. *Virginia*, 328 U. S. 373, presented phases of the problem of segregation. The former held unconstitutional a Louisiana law forbidding steamboats (which plied the Mississippi) from segregating passengers according to race. The latter held unconstitutional a Virginia law requiring segregation of passengers on interstate motor buses. It was held that diverse regulations of that character by the several States through which the traffic moved would be an undue or unreasonable burden on interstate commerce. But the question here is a simpler one. It is whether a State can prevent a carrier in foreign commerce from denying passage to a person because of his race or color. For this is a case of a discrimination against a Negro by a carrier's complete denial of passage to her because of her race.

It is unthinkable to me that we would strike down a state law which required all carriers—local and interstate—to transport all persons regardless of their race or color. The common-law duty of carriers was to provide equal service to all, a duty which the Court has held a State may require of interstate carriers in the

absence of a conflicting federal law. *Missouri Pacific R. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 619, 623–624. And the police power of a State under our constitutional system is adequate for the protection of the civil rights of its citizens against discrimination by reason of race or color. *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88. Moreover, in this situation there is no basis for saying that the Commerce Clause itself defeats such a law. This regulation would not place a burden on interstate commerce within the meaning of our cases. It does not impose a regulation which discriminates against interstate commerce or which, by specifying the mode in which it shall be conducted, disturbs the uniformity essential to its proper functioning. See *Southern Pacific R. Co.* v. *Arizona*, 325 U. S. 761; *Morgan* v. *Virginia*, *supra*. I see nothing in the Commerce Clause which places foreign commerce on a more protected level.

There is in every case, of course, a possibility that Congress may pass laws regulating foreign or interstate commerce in conflict with regulations prescribed by a State. Or in the case of foreign commerce the national government might act through a treaty. Inconsistent State law would then give way to any exercise of federal power within the scope of constitutional authority. But I am aware of no power which Congress has to create different classes of citizenship according to color so as to grant freedom of movement in the channels of commerce to certain classes only. Cf. *Edwards* v. *California*, 314 U. S. 160, 177–181. The federal policy reflected in Acts of Congress indeed bars any such discrimination (see *Mitchell* v. *United States*, 313 U. S. 80) and so is wholly in harmony with Michigan's law. And no treaty reveals a different attitude.

Moreover, there is no danger of burden and confusion from diverse state laws if Michigan's regulation is sus-

tained. If a sister State undertook to bar Negroes from passage on public carriers, that law would not only contravene the federal rule but also invade a "fundamental individual right which is guaranteed against state action by the Fourteenth Amendment." *Mitchell* v. *United States, supra,* p. 94. Nothing short of at least "equality of legal right" (*Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 350) in obtaining transportation can satisfy the Equal Protection Clause. Hence I do not see how approval of Michigan's law in any way interferes with the uniformity essential for the movement of vehicles in commerce. The only constitutional uniformity is uniformity in the Michigan pattern.

If a State's law made a head-on collision with the policy of a foreign power whose shore were reached by our vessels, a different problem might be presented. But no such conflict is present here.

MR. JUSTICE BLACK, who joins in the opinion of the Court, concurs also in this opinion.

SUPREME COURT OF THE UNITED STATES

No. 374.—October Term, 1947.

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[February 2, 1948.]

Mr. Justice Jackson, with whom The Chief Justice agrees, dissenting.

This Michigan statute undoubtedly is valid when applied to Michigan intrastate commerce, just as a Congressional enactment of like tenor would undoubtedly be valid as to commerce among the states and with foreign countries. The question here, however, is whether the Michigan statute can validly be applied to that commerce which is set apart by the Constitution for regulation by the Congress.

The sphere of a state's power has not been thought to expand or contract because of the policy embodied in a particular regulation. A state statute requiring equality of accommodations for white and Negro passengers was held invalid as applied to interstate commerce. *Hall* v. *De Cuir*, 95 U. S. 485. On the same principle a state statute requiring segregation was held invalid as applied to interstate commerce. *Morgan* v. *Virginia*, 328 U. S. 373. Heretofore the Court steadily has held that the failure of Congress to enact a law on this specific subject does not operate to expose interstate commerce to the burden of local rules, no matter what policy in this highly controversial matter a state sought to advance. It would seem to me that the constitutional principles which have been so apparent to the Court that it would

not permit local policies to burden national commerce, are even more obvious in relation to foreign commerce.

Certainly if any state can enforce regulations concerning embarkation and landing, it can in effect control much that pertains to the foreign journey. To determine what persons and commodities shall be taken abroad is to control what persons and commodities may become the subject of foreign commerce, and that is to control the life-blood of the commerce itself. These are identical with matters in which this commerce is subject to control by federal and foreign governments. The Federal Government takes active control of the inbound movement of goods by virtue of its customs service and of the movement of persons by virtue of its immigration service across these boundaries. The Canadian government does the same on the outbound crossing of the international line. It does so in this case, and it does so even if the bulk of the travelers do not go very far or stay very long and are merely amusement bent.

The wholesome and amiable situation detailed in the Court's opinion is made possible only by international relations wholly controlled by the Federal Government. It alone can effectively protect or foster this kind of commerce, and it alone should be allowed to burden it. If we are to concede this power over foreign commerce to one state, it would seem that it could logically be claimed by every state which has a port, border, or landing field used by foreign commerce.

The Court admits that the commerce involved in this case is foreign commerce, but subjects it to the state police power on the ground that it is not very foreign. It fails to lay down any standard by which we can judge when foreign commerce is foreign enough to become free of local regulation. The commerce involved here is not distinguishable from a great deal of the traffic across our Canadian and Mexican borders, except perhaps in volume.

Communities have sprung up on either side, whose social and economic relations are interdependent, but are conducted with scrupulous regard for the international boundary. Localities on either side of the line may develop in reliance on a certain reciprocity and stability of policy which has characterized two nations for years, when they cannot rely on similar stability or farsightedness in local policy.

It seems to me no adequate protection of foreign commerce from a multitude and diversity of burdening and capricious local regulations that this Court may stand ready, as in this case, to apply itself to an analysis of the traffic involved and determine in each case whether the local interest in it is sufficiently strong and the foreign element is sufficiently weak so that we will permit the regulation to stand. We do not and apparently cannot enunciate any legal criteria by which those who engage in foreign commerce can predict which classification we will impose upon any particular operation and we lay down no rule other than our passing impression to guide ourselves or our successors. All is left to case-by-case conjecture. The commerce clause was intended to promote commerce rather than litigation.

I believe that once it is conceded, as it is in this case, that the commerce involved is foreign commerce, that fact alone should be enough to prevent a state from controlling what may, or what must, move in the stream of that commerce.